Supreme Court, U.S.
FILED

No. 94 232

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IN THE

Supreme Court of the United States

October Term, 1994

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Petitioners,

against

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether a federal appeals court, consistent with the limits of federal jurisdiction imposed by Article III and the Eleventh Amendment, following dismissal of various claims against State defendants based on federal law, may hold these defendants liable for a violation of State law not previously raised by the plaintiffs as a cause of action, and may award retroactive monetary damages against the State defendants for that purported liability.

Parties

The parties to the proceeding below were:

1. Lee S. Rumsey, Plaintiff;

2. Douglas DiGerlando, Plaintiff;

3. Michael Rhodes, Plaintiff;

4. Thomas Graves, Plaintiff;

5. New York State Department of Correctional Services, Defendant;

6. Thomas Coughlin, III, as Commissioner of the New York State Department of Correctional Services, Defendant.

Plaintiffs Rumsey, DiGerlando, Rhodes, and Graves brought suit individually and as representatives of a class of persons similarly situated.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Petitioners,

-against-

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners New York State Department of Correctional Services and Thomas Coughlin, III, as Commissioner of the New York State Department of Correctional Services, respectfully pray that a writ of certiorari issue to review the

judgment and opinion of the United States Court of Appeals for the Second Circuit in this action dated March 14, 1994.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, dated March 14, 1994, is reported at 19 F3d 83 (2d Cir 1994), and is reprinted in the appendix hereto, p. 1a, *infra*.

The Memorandum Opinion and Judgment of the District Court, dated March 2, 1993, is unreported and is reprinted in the appendix hereto, p. 22a, *infra*.

The Memorandum Opinion and Order of the District Court, dated December 31, 1991, is unreported and is reprinted in the appendix hereto, p. 49a, *infra*.

The Memorandum Opinion and Judgment of the District Court, dated February 19, 1987, is unreported and is reprinted in the appendix hereto, p. 74a, *infra*.

The order of the Court of Appeals for the Second Circuit denying defendants' petition for rehearing, dated May 11, 1994, is reprinted in the appendix hereto, p. 88a, *infra*.

Jurisdiction

Invoking federal jurisdiction under 38 USC § 2022 [renumbered § 4302], respondents brought this suit in the Northern District of New York. On March 2, 1993, the Northern District entered judgment in favor of respondents. See p. 22a, *infra*.

On petitioners' appeal and respondents' cross-appeal, the Second Circuit on March 14, 1994 entered a judgment and opinion affirming in part and reversing in part the District Court's March 1993 judgment. See p. 1a, *infra*.

This Court's jurisdiction is invoked under 28 USC §1254(1).

Constitutional Provision Involved

United States Constitution, Eleventh Amendment:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statement of the Case

Respondents in this matter are employees of petitioner Department of Correctional Services (Department) and are also members of the New York State National Guard or other reserve units of the United States Armed Forces. In their capacity as military reservists, respondents are obliged to fulfill various annual training requirements, generally

consisting of weekend drills and a two-week summer training session. In September 1982, respondents commenced an action against state petitioners challenging an employment practice whereby the Department rescheduled the pass days (*i.e.*, days off) of its employees to correspond with their military reserve duty training schedule to the extent possible. Respondents alleged in their complaint that this practice (1) violated their collective bargaining agreement solely because of their status as reservists and therefore violated the Veterans' Reemployment Rights Act of 1974, 38 USC §§ 2021 *et seq.* [renumbered §§4301 *et seq.*] (Veterans' Act); (2) violated a provision of New York State's Military Law; and (3) violated the Equal Protection Clause. Significantly, respondents did not allege a violation of the collective bargaining agreement as an independent or pendent cause of action. Rather, they alleged this violation as a factual predicate of the violation of the Veterans' Act.

Respondents sought injunctive relief, compensation for past rescheduled pass days, and attorneys' fees.

Following trial, the district court (Cholakis, J.) issued a Memorandum Decision and Order on February 19, 1987, holding that the rescheduling policy violated a provision of plaintiffs' collective bargaining agreement and consequently violated 38 USC §2021(b)(3) (74a). The district court did not rule on plaintiffs' pendent Military Law claim. In a subsequent Memorandum Decision and Order dated December 31, 1991, the court awarded damages against petitioners at overtime rates for each pass day rescheduled, and also awarded attorneys' fees against petitioners pursuant to 42 USC §1988 (49a). Finally, in a Memorandum Decision and Judgment dated March 2, 1993, the district court approved a schedule of awards to class members and

retained jurisdiction for the award of attorneys' fees (22a).

On appeal, the Court of Appeals for the Second Circuit in March 1994 affirmed in part and reversed in part the district court's order and remanded the matter to the district court for recalculation of damages (21a). The Court concluded, *inter alia*, that: (1) the district court's holding that the rescheduling policy violated plaintiffs' collective bargaining agreement with the State of New York was not clearly erroneous (12a); but (2) the rescheduling policy did not constitute a violation of the Veterans' Act (16a); and (3) respondents were not entitled to attorney's fees under 42 USC §1988 (20a). The court also ruled, however, that the district court's award of damages was proper to the extent that such damages cured the breach of the collective bargaining agreement (17a). It offered no explanation for its decision to consider the breach of contract claim as an independent cause of action upon its conclusion that a breach, even if it had occurred, would not violate the federal Veterans' Act. Nor did it expressly consider the propriety of an award of retroactive damages against the State under the Eleventh Amendment.

Petitioners filed a motion for rehearing dated March 21, 1994, directing to the court's attention the Eleventh Amendment issues implicated by its March 14 decision in light of this Court's holdings in *Pennhurst State School & Hospital v Halderman*, 465 US 89 (1984), and *Edelman v Jordan*, 415 US 651 (1974). Petitioners noted that the State of New York was plainly the true party of interest in this action, and that the State had at no time waived or abrogated its sover-

eign immunity. On May 11, 1994, that petition for rehearing was denied.[1]

Reasons for Granting the Writ

The Second Circuit's award of retroactive monetary damages for breach of contract against the State and its decision to review the contract claim as a separate pendent claim against the State is in patent conflict with the decisions of this Court in *Pennhurst* and *Edelman*.

The Second Circuit's decision requires New York to pay damages based solely on a finding that there was a violation of the collective bargaining agreement — a finding which was purely a matter of state law. Indeed, the court's decision expressly rejected the claim that there had been a violation of the federal laws invoked by respondents.

Permitting recovery in federal court on this purely state law claim is in plain disregard of the Court's decision in *Pennhurst State School & Hospital v Halderman*, 465 US 89 (1984). In *Pennhurst*, this Court held that, in the absence of express waiver of sovereign immunity by the State, the Eleventh Amendment divests federal courts of subject matter jurisdiction over causes of action by citizens against a State based on state law, regardless of the nature of the relief sought or the strength of considerations generally guiding the exercise of pendent jurisdiction in federal courts. Noting that previous decisions of the Court had balanced constitutional interests

[1]Respondents filed a petition for rehearing and for reconsideration en banc to contest other portions of the Second Circuit's opinion; that petition was denied on May 5, 1994.

in States' sovereign immunity with "the need to promote the vindication of federal rights" (465 US at 105), the Court stated in *Pennhurst* (465 US at 106, emphasis in original):

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. . . . A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

The Court concluded that the Eleventh Amendment's abridgment of Article III jurisdiction nullified claims against States in federal court which might be permitted against non-State parties under considerations of pendent jurisdiction (465 US at 121):

> In sum, . . . neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that each claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. . . . We now hold that this principle applies as well to state-law

claims brought into federal court under pendent jurisdiction.

Pennhurst conclusively articulated the vital function of the Eleventh Amendment in preserving the principle of sovereign immunity as a limitation on the exercise of federal judicial power under Article III. As this Court has noted on numerous occasions, the limitation in subject matter jurisdiction over actions against States based on State law is a fundamental feature of Article III and cannot be lightly ignored. *See, e.g., Welch v Texas Department of Highways and Public Transportation*, 483 US 468, 472-474 (1987); *Atascadero State Hospital v Scanlon*, 473 US 234, 237-244 (1985); *County of Oneida v Oneida Indian Nation*, 470 US 226, 251-252 (1985).

The court below remained indifferent to this precept and these admonitions. It failed to recognize that, upon its dismissal of respondents' Veterans' Act and Equal Protection Clause claims on appeal, the holding in *Pennhurst* compelled dismissal of any additional state law claims for lack of subject matter jurisdiction. More insidiously, the court decided to reach beyond the causes of action stated by respondents and unilaterally fashioned a new cause of action against the State defendants for breach of contract. The court took this extraordinary measure *sua sponte*, after the case had been briefed and argued, without warning to the parties; it provided no opportunity to the parties to address the implications of its actions under the Eleventh Amendment.[2] Nor did the court offer any explanation for its holding on this issue, either in its decision or in its denial of petitioners' application for rehearing.

[2]Of course, the error in the court's ruling on the breach of contract issue and award of retroactive damages for that purported breach would remain even if that issue had been pleaded properly as a pendent cause of action.

Finally, the court failed to recognize that, upon its issuance of a decision as to the contract "claim", the award of retroactive monetary damages against the state respondents for violation of the collective bargaining agreement was plainly prohibited by this Court's holding in *Edelman v Jordan*, 415 US 651 (1974) (absent express waiver of sovereign immunity or proper and unequivocal abrogation of state immunity by Congress, award of retroactive monetary damages against the State is barred by Eleventh Amendment).

The Second Circuit's opinion exhibited an overt and inexplicable disregard for the principles of State sovereign immunity and this Court's precedent under the Eleventh Amendment. Apart from its blatant nature and significant adverse fiscal effect upon the State,[3] we believe the Second Circuit's opinion in this case invites an ominous consequence: the broad and improvident extension of Article III jurisdiction over state law claims raised against State defendants under the countenance of meritless federal law claims. This precedent and consequence are regrettable on grounds both constitutional and practical.[4] For this reason, we believe that the court's decision warrants review and reversal by this Court.

[3]The award to respondents occasioned by the Second Circuit's decision has been estimated to amount currently to more than $4.5 million.

[4]The problems of the overburdened federal judiciary have long been recognized and require no detailed comment. *See, e.g.*, Federal Judicial Center, Report of the Study Group in the Caseload of the Supreme Court (1972), *reprinted in* 57 FRD 573 (1972); Commission on Revision of the Federal Court Appellant System, Structure and Internal Procedures: Recommendations for Change (1975), *reprinted in* 67 FRD 195 (1975); The Needs of the Federal Courts, Report of the Justice Committee on Revision of the Federal Judicial System (January 1977); Report of the Federal Courts Study Committee (April 2, 1990, pp 4-9).

CONCLUSION

This court should grant a writ of certiorari.

Dated: Albany, New York
August 1, 1994

Respectfully submitted,
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APPENDIX A—Opinion of the Second Circuit Court of Appeals, dated March 14, 1994.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 241, 528—August Term 1993

(Argued September 27, 1993 Decided March 14, 1994)

Docket Nos. 93-7273, 93-7333

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES, and THOMAS GRAVES, individually and as representatives of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants-Cross-Appellees.

Before:

CARDAMONE, MCLAUGHLIN and LAY,*

Circuit Judges.

---

* Honorable Donald P. Lay, Senior Circuit Court Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

New York State Department of Correctional Services and Thomas Coughlin III appeal a judgment dated March 2, 1993 of the United States District Court for the Northern District of New York (Cholakis, J.) compensating plaintiffs for lost wages and awarding prejudgment interest and attorney's fees because the application of a departmental directive denied plaintiffs an incident or advantage of their employment in violation of 38 U.S.C. § 4301(b)(3) (1988). Plaintiffs cross-appeal on the damages issue.

Affirmed, in part, reversed, in part, and remanded.

Cross-appeal affirmed.

JOHN MCCONNELL, Assistant Attorney General, Albany, New York (Robert Abrams, Attorney General, Peter H. Schiff, Deputy Solicitor General, Albany, New York, of counsel), *for Defendants-Appellants-Cross-Appellees.*

THOMAS J. FORREST, Albany, New York (James J. Seaman, Rowley, Forrest, O'Donnell & Hite, P.C., Albany, New York, of counsel), *for Plaintiffs-Appellees-Cross-Appellants.*

CARDAMONE, *Circuit Judge*:

On September 15, 1982 Lee S. Rumsey, individually and as a member of a class of nearly 1000 New York State correction officers, sergeants and lieutenants employed by the Department of Correctional Services, all of whom are also members of the New York National Guard or a

reservist branch of the U.S. Armed Forces, commenced a class action in the United States District Court for the Northern District of New York (Cholakis, J.). The action alleged that the defendants, New York State Department of Correctional Services (Department) and Thomas Coughlin III, Commissioner of the Department, violated the Veterans' Reemployment Rights Act, (Veterans' Act), 38 U.S.C. §§ 2021(b)(3) and 2024(d) (1988) (renumbered 38 U.S.C. §§ 4301(b)(3) and 4304(d)[1]) and New York Military Law § 242(4) (McKinney 1990). In addition, the complaint asserted that the class members were denied the equal protection of the law, violating 42 U.S.C. § 1983 (1988).

The action was prompted by defendants' promulgation of Directive No. 2212, which required correction officers to change their pass days (days off) to correspond with their military reservist obligations. Plaintiffs sought injunctive relief, compensation claimed to have been lost as a result of the rescheduled pass days, and attorney's fees pursuant to 42 U.S.C. § 1988 (Supp. III 1991). Just as the poet who wrote: "Sewing at once, with a double thread, A Shroud as well as a Shirt," Thomas Hood, *The Song of the Shirt*, in 1 *The Poetical Works of Thomas Hood* 193, 194 (Little, Brown & Co. 1864), the trial judge thought the Department's promulgation of Directive No. 2212 had twin consequences, that is to say, it at once violated both a collective bargaining agreement the Department had with its National Guard/reservist employees *and* § 4301(b)(3) of the Veterans' Act. We cannot agree that it had such double consequences. Before explaining our reasons for differing from the trial court, we set forth the

---

[1] Pursuant to Public Law 102-568, 106 Stat. 4340, 4341, 38 U.S.C. §§ 2021-2027 were renumbered as 38 U.S.C. §§ 4301-4307 on October 29, 1992.

somewhat complex circumstances that prompted this litigation.

BACKGROUND

Plaintiffs are all members of either the Security Services Unit, representing correction officers and sergeants, or the Security Supervisors Unit, representing correction lieutenants. The bargaining representative for both of these units is the New York State Inspection Security and Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO (Council 82). Collective bargaining agreements covering these state employees have been in force since 1970, involving several labor agreements over the time span alleged in the complaint. Because all pertinent provisions in these agreements are the same and apply to both employee bargaining units, references in what follows will be to the provisions of the 1982-85 Security Services Unit collective bargaining agreement, which went into effect on April 1, 1982.

Pursuant to that agreement, job vacancies in state correctional facilities are posted as they occur, and interested employees may bid for them. The postings indicate the work location, that is, at what specific correctional institution there is an opening, and include the hours and days the shift is to be worked, and what days are off. Assignments to these vacancies are awarded on a seniority basis. The labor agreement states that "[r]egularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime." The Department contends that this provision has been interpreted to mean that overtime must be paid to an employee whose pass days are changed only after the pass days have been posted.

Many hundreds of correction officers are reserve members of the Armed Forces. Counsel in this case have stipulated the plaintiff class to consist of approximately 970 members. When a temporary vacancy is created because an officer is performing military duties, the position must be filled by another officer to ensure that the correctional facility is adequately staffed. The substituting officer is entitled to overtime. During a 1981 state investigation following complaints about military leave procedures, many abuses were discovered. Those included, for example, employees failing to report to the military after being granted leave by the Department, departing early from military duty, or submitting fictitious military leave orders. About 47 percent of the 245 audited military leave cases were found to be without supporting documentation. Those abuses allegedly cost the State of New York millions of dollars.

In response to this perceived drain on the public fisc, the Department promulgated the subject Directive No. 2212 setting forth procedures for requesting, approving and verifying the use of paid military leave by employees. By applying Directive No. 2212 the Department was able to change employees' days off to coincide with their military duty days, thereby reducing overtime necessary to fill vacancies that would have occurred had the officer been performing military duty on a regularly assigned work day. The result is that employee-reservists before passage of the Directive worked three days and were paid for five—three days work, two days off without pay, followed by two days of military duty for which they were paid. After the Directive, the same individuals had to work five days to get paid for five days, the two days of military duty being on non-pay pass days.

In its March 2, 1993 judgment following a non-jury trial, the district court first found plaintiffs' rights to pass days were protected by their collective bargaining agreement, and since Directive No. 2212 denied plaintiffs an incident or advantage of their employment because of their military reservist obligations, the Department's action, the trial court concluded, also violated 38 U.S.C. § 4301(b)(3). It therefore made the following award to plaintiffs: compensation for lost wages, measured by the salary the employees would have been paid had their pass days not been reassigned, limited to the first 30 days compensable under N.Y. Mil. Law § 242(5); damages to employees who had taken personal leave or vacation leave instead of applying for military leave; prejudgment interest and attorney's fees.

This calculation of plaintiffs' damages was set forth in the district court's February 19, 1987 decision and order, and explained further in its December 31, 1991 decision and order. In the later decision, the trial judge indicated that compensation for lost wages was to be measured at the overtime rate:

> reflecting both (1) the pay plaintiffs would have received had the military days occurred on non-pass days (which would have happened absent defendants' rescheduling), and (2) that, since plaintiffs worked five full days and had two military days that, absent rescheduling, would have been compensable, the military days should count towards overtime for those weeks, in accordance with provisions of the collective bargaining agreement.

The Department appeals the ruling that held assigned pass days were an incident or advantage of employment, and that further held the application of Directive No. 2212

violated both the collective bargaining agreement *and* § 4301(b)(3) of the Veterans' Act. The Department also appeals the damage award maintaining that (1) the Eleventh Amendment bars the award of retroactive monetary damages against the state; (2) if retroactive monetary damages are appropriate, they were calculated incorrectly; and (3) attorney's fees are not available through application of 42 U.S.C. § 1988. The plaintiffs have cross-appealed because overtime damages were limited to the first 30 days compensable under N.Y. Mil. Law § 242(5). The award of prejudgment interest is not challenged on appeal. We pass to a discussion of these issues.

DISCUSSION

I *Plaintiffs' Rights*

A. *Under The Collective Bargaining Agreement*

We must ascertain first whether Directive No. 2212, which made employee-reservists perform their military duties on their regular days off, violated the collective bargaining agreement. The district court found plaintiffs' right to assigned pass days, secured through an exercise of seniority, was a right protected by the labor agreement. We review this finding under the clearly erroneous standard, *see* Fed. R. Civ. P. 52(a), and that finding need only be plausible when examining the record as a whole. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Under Article 24 of the labor agreement the Department reserved to itself the right to make any job or shift assignment necessary to maintain the services of the Department. It is required to post for 30 days all permanent vacancies before making a permanent assignment. As

related, employees select their work assignments by bidding on work packages that contain the particular shift to be worked, its location and the pass day or days off schedule. Because pass days are advertised to employees as a combined package along with shift and work location, the successful bidder is awarded the entire work package.

Paragraph 24.2 further provides "[s]eniority shall be the basis by which employees shall select pass days." Seniority is defined in ¶ 24.1 of the labor agreement as "the length of an employee's uninterrupted service in title in a department or agency including sick leave, military leaves not to exceed four years and other leaves of absence which do not exceed one year and Worker's Compensation leave." The district court ruled that once an employee is assigned a work package the pass days are set and regularly scheduled for as long as the employee remains a member of that particular work-shift.

The trial court also found that ¶ 15.3(e)—which provides that "[r]egularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime"—protects employees from having their assigned pass days changed. The Department contends this provision merely restrains it as employer from making *ad hoc* changes to an individual employee's pass days, but that it does not bar the Department from limiting overtime by making general policy decisions. The Department's argument has a plausible ring to it, but the plain language of ¶ 15.3(e) is to the contrary. It prohibits the Department from changing pass days cast in the guise of a departmental policy, which in practice allow the Department to avoid the payment of overtime, whether the pass day change occurred once and only affected one employee or whether it occurred, as here, thousands of times and affected many employees.

Nonetheless, the Department maintains, a November 1976 settlement agreement reached in a suit by campus police officers at the State University of New York (SUNY) at Plattsburg regarding the rescheduling of days off changed the application of ¶ 15.3(e) for correction officers. The State of New York Office of Employee Relations and Council 82 entered into the so-called Boas settlement agreement, which interpreted ¶ 15.3(e) (then Article 16.3(e) of a predecessor labor agreement) as follows: "[e]xcept in the case of an emergency or due to unforeseen circumstances, any employee whose posted regularly scheduled day off is changed shall be paid at the overtime rate that day." The SUNY campus police officers are covered by the same collective bargaining agreement as the correction officers, but they are on a work schedule where management posts job assignments 28 days before the work schedule goes into effect. Employees have to refer to the posted schedule to determine what shifts and rest days management has assigned.

The Department insists the Boas settlement applies to the correction officers and, after an employee's pass days are posted, they may be changed provided the employee is paid overtime for the changed pass day. The Boas settlement attempted to reconcile the charge that the Department was making changes in days off to avoid paying overtime. Nevertheless, no evidence at trial showed that the pass days of the correction officers before us were posted within the meaning of the Boas settlement. Nor is there any language in the settlement making it applicable beyond the SUNY system. Joseph Bress who signed the settlement on behalf of the State of New York testified at trial that he and Carl Gray, former Executive Director for Council 82, agreed that it applied to the Council 82 contract generally. He further testified that the Office of

Employee Relations had applied the settlement agreement subsequent to its signing and that it was still being applied as a matter of practice between the parties. Based on his testimony, the Department urges that the Boas settlement be enforced against the present plaintiffs. Mr. Gray, who signed the Boas settlement on behalf of Council 82, averred that when it was signed it was intended to apply solely to SUNY security officers. Richard Bischert, District Director for Council 82, also stated the application of the Boas settlement was limited to university police.

Although the district court did not address the Boas settlement explicitly, it took considerable testimony on this subject and obviously considered whether the settlement agreement was applicable when it discussed the Department's negotiation strategy regarding the attempted elimination of ¶ 15.3(e) from the labor agreement. In addition, the record reveals that the trial court was fully aware of the details and complexities of the Boas settlement. Hence, in failing to make a finding that the Boas settlement applied to the correction officers, it impliedly found it did not. Refusing to give effect to the Boas settlement was a determination the district court made based on the credibility of witnesses who gave conflicting testimony and may not be said to be clearly erroneous in light of the record evidence; even though a contrary view would not be unreasonable. *See Anderson*, 470 U.S. at 574.

On March 30, 1982 after a year-long investigation into the earlier recited military leave abuses, the Department issued Directive No. 2212 setting forth procedures for requesting, approving and verifying the use of paid military leave by Department employees. Employees were directed to provide their watch commander with a copy of each quarterly military training schedule. The directive advised employees that "[t]he Deployment Lieutenant/

Attendance Control Office will review the quarterly training schedules and extra ordered military duty so that, when practicable and consistent with the Department's personnel requirements, regular days off and shift assignments may be revised to avoid military drills during scheduled working hours." Employees were also informed that "[t]he entire thirty (30) days paid military leave allowance must be used before military leave without pay, or the use of accrued vacation, personal leave or holiday leaves may be granted."

According to the Department, Directive No. 2212 was designed to mitigate military leave abuses, reduce global overtime and other costs caused by absenteeism through this abuse, minimize use of vacation and personal leave for military duty and maintain the fullest possible complement of employees at correctional facilities throughout the state. Prior to its adoption, the Department did not change the pass days of any of the affected employees to coincide with their military duty days. Instead, if military duty fell on an employee's scheduled work day he or she was granted military leave and still retained his or her assigned pass days. By using the authorization contained in Directive No. 2212, the Department was able to reschedule 15,950 pass days.

We agree with the district court's findings that the Department had twin purposes in rescheduling pass days: to provide the increased manpower needed to fulfill the duties mandated by law and to reduce overtime compensation. We also agree with the trial court's conclusion that the Department violated article 24 of the collective bargaining agreement when it rescheduled appellees' pass days. It is evident that application of the Directive altered the seniority provisions of ¶¶ 24.1 and 24.2 of the labor agreement since employees could not select pass days

independently of the seniority-based selection of the entire job package. Further, the Directive authorized the Department to change pass days to avoid paying overtime contrary to the provisions of ¶ 15.3(e) of the labor agreement. Because the language of ¶ 15.3(e) does not require that avoiding the payment of overtime be the *sole* reason for changing pass days, the finding that the Directive violated that provision of the labor contract is not clearly erroneous.

B. *Under The Veterans' Act*

We turn now to analysis of the Veterans' Act. The key provision of that Act states:

> Any person who seeks or holds a position [in the employ of a State] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

38 U.S.C. § 4301(b)(3). The question to be decided is whether the Department's alteration of pass days through the application of Directive No. 2212 deprived plaintiffs of an "incident or advantage of employment" thus violating § 4031(b)(3) of the Veterans' Act. It does not automatically follow, as the district court held, that breach of the collective bargaining agreement is a violation of the Veterans' Act.

In *Monroe v. Standard Oil Co.*, 452 U.S. 549, 552 n.2 (1981), the seminal case applying the Veterans' Act to reservists, the Supreme Court concluded § 4301(b)(3) provides protection to both Ready Reservists and National Guardsmen. *See also United States ex rel. Reilly v. New England Teamsters & Trucking Indus. Pension Fund*, 737

F.2d 1274, 1278-79 (2d Cir. 1984). Congress' aim in this legislation is plain. It is "to prevent reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership." S. Rep. No. 1477, 90th Cong., 2d Sess. 1-2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3421, 3421. The House Report described the bill as providing:

> "job protection for employees with obligations as members of a reserve component. . . .
>
> Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [*sic*] solely [*sic*] because of such Reserve affiliation.
>
> *It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligation.*"

H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968) (*quoted in Monroe*, 452 U.S. at 558 (emphasis added)). In the House Committee hearing Rear Admiral Burton H. Shupper, U.S.N., testified that one aspect of the bill protects employees against being " 'denied retention in employment or advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces.' " *Hearings on H.R. 11509 Before Subcomm. No. 3 of the House Comm. on Armed Services*, 89th Cong., 1st Sess. 5315 (1966) (*quoted in Monroe*, 452 U.S. at 559).

Section 4304(d) of the Veterans' Act grants an employee the right upon request to be granted leave by

the employer "for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States." Significantly, for our purposes, it was never Congress' purpose in protecting the rights of employee-reservists to afford them special privileges or benefits not available to their co-workers. *See Monroe*, 452 U.S. at 561.

In order for Directive No. 2212 to violate the Veterans' Act, the awarding of pass days must be considered an "incident or advantage of employment" under § 4301(b)(3), and must be found to be within Congress' focus of "protect[ing] reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations." *Id.* at 560. An employer may not by the use of slippery words or a contrived definition deprive its employee-reservists of substantial rights granted them under the Act. *See Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 229 (1966).

Here the Department characterizes the change of pass days or regular days off as being less than a substantial right and therefore not covered by the Act. In support of that proposition, the Department points out that the Directive did not reduce plaintiffs' compensation—employee-reservists continued to earn the same amount of pay for the same amount of work as non-reservists—nor did it affect promotion rights or pension rights or the opportunity to earn overtime pay.

Cases holding that an employer has violated the Veterans' Act have involved more dire actions vis-à-vis the employee-reservist's status as an employee: for example, loss of employment, *see Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1073 (5th Cir. 1979), or workplace assignment and duties assigned, *see Carlson v.*

New Hampshire Department of Safety, 609 F.2d 1024, 1027 (1st Cir. 1979) (employer may not permanently reassign an employee to a new post with different duties and work schedule on account of employee's reserve obligation), *cert. denied*, 446 U.S. 913 (1980).

Perhaps one of the most important incidents or advantages of employment is the salary assured by a 40-hour work week guaranteed under a collective bargaining agreement. *See West v. Safeway Stores, Inc.*, 609 F.2d 147, 150 (5th Cir. 1980) (employer required to schedule employee's 40-hour work week around the employee's military training obligation). In the case at hand, plaintiffs were paid for and worked a full 40-hour week. Concededly, plaintiffs lost the privilege of working 24 hours and being paid as though they had worked 40 hours, a benefit they previously enjoyed before the advent of Directive No. 2212. But the new rule did not penalize them, or treat them differently than the other non-reservist correction officers, on account of their reservist status.

Decisions under the Veterans' Act differ with respect to a contractual obligation to afford opportunities to earn overtime. *Compare Breeding v. TRW, Inc., Ross Gear Div.*, 477 F. Supp. 1177, 1184 (M.D. Tenn. 1979) (where collective bargaining agreement provides opportunities to work overtime such must be offered to employees equally; an employee unavailable to work overtime on account of military training was not entitled under the Act to an alternative opportunity), *aff'd*, 665 F.2d 1043 (6th Cir. 1981) *with Lott v. Goodyear Aerospace Corp.*, 395 F. Supp. 866, 869-70 (N.D. Ohio 1975) (similar circumstance held to deny the employee an incident of employment) *and Carney v. Cummins Engine Co.*, 602 F.2d 763, 766-67 (7th Cir. 1979) (employer must grant employee

overtime opportunities missed by reason of National Guard service), *cert. denied*, 444 U.S. 1073 (1980).

In the present litigation the reservists were not seeking the opportunity to earn overtime. It was their co-workers substituting for the reservists who earned such pay. As the district court found in its February 19, 1987 decision, "the overtime of the particular National Guardsman/Reservist whose pass days are being changed may not be affected." Section 4301(b)(3) has as its aim the limited purpose of safeguarding the employee-reservist from discrimination such as a failure to promote or a discharge prompted solely by the employee's reserve status. *See Monroe*, 459 U.S. at 559. True, the Department's action touched the general subject of overtime, but it did not diminish a reservists' right to earn overtime pay when he or she worked overtime. The changing of a reservist's pass days is not a substantial right such as, for instance, discharge, demotion, or failure to promote, all matters safeguarded by the Act.

In sum, the district court wrongly ruled that the violation of the collective bargaining agreement by itself constituted a violation of § 4301(b)(3). Directive No. 2212 did not deprive plaintiffs of an "incident or advantage of employment" in violation of the Veterans' Act. Accordingly, we need not reach the issue of whether the Eleventh Amendment bars the award of retroactive damages against the state.

II Damages

Discussion now proceeds to the issue of damages. The contractual breach of plaintiffs' collective bargaining agreement caused by the Directive gives rise to damages. The labor agreement provides at ¶ 15.1(g) that "[t]ime

during which an employee is excused from work because of vacation, holidays, personal leave, sick leave at full pay, compensatory time off or other leave at full pay shall be considered as time worked for the purpose of computing overtime." In its February 19, 1987 decision the district court found plaintiffs "lost the value of their pass days, which value is to be measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave." The parties were directed to submit information regarding the number of pass days reassigned for each member of plaintiffs' class since March 30, 1982 and the wages each member would have received had pass days not been reassigned to coincide with military leave days.

Because we hold there was no violation of the Veterans' Act, we affirm the calculation of damages for plaintiffs set forth in the trial court's December 31, 1991 decision only as related to a breach of the collective bargaining agreement. We recognize that pass days rescheduled as a result of Directive No. 2212 will be compensated at the overtime rate and confined to the application of ¶ 15.1(g). Because of the dynamics of ¶ 15.1(g), the district court must review the damage award on an individual basis to ensure it is not of a speculative nature. Damages should not be awarded under the Veterans' Act because it was not transgressed by the Department's promulgation of Directive No. 2212.

On plaintiffs' cross-appeal, they contend they should recover straight time for each day in excess of 30 that an officer's pass days were changed to accommodate military reserve duty. This argument is unavoiding because compensation is provided pursuant to N.Y. Mil. Law § 242(5) for only 30 days. Damages should apply up to the 30-day maximum per year authorized by § 242(5) because after

these 30 days are used up, the military leave days will no longer be counted under ¶ 15.1(g) as they should not be considered "other leave at full pay" for the purpose of calculating overtime. The district court ruled properly on this aspect of the damages issue.

It nonetheless erred when it granted a day's pay to each plaintiff who used accrued personal leave instead of notifying the Department of their military duties. Even though the provisions of Directive No. 2212 authorizing pass days to be changed contravene the collective bargaining agreement, the procedures designed to notify the employer of military duty, if pay was expected under New York Military Law, were valid. By taking personal leave for these days, plaintiffs said in effect that they did not desire to have the benefits of § 242(5). The correction officers should have complied with the Directive and then made a claim. They are not entitled to pay for those days on which they claimed personal leave, sick time or the like. Thus, the damages issue must be remanded in order for the district court to recalculate the award to eliminate this overpayment to plaintiffs.

III Attorney's Fees pursuant to 42 U.S.C. § 1988

The trial court further ruled in its December 31, 1991 decision that although it did not reach the equal protection claim under § 1983, plaintiffs were entitled to attorney's fees because their equal protection claim was substantial, and even though the Veterans' Act does not provide for attorney's fees, neither the statute nor its legislative history precluded awarding attorney's fees under 42 U.S.C. § 1988. This ruling was in error.

Awarding attorney's fees under § 1988 may only be based on plaintiffs' equal protection claim. Here no such

claim exists. Plaintiffs do not contend they have a fundamental right to perform military reservist duties on specific days, but instead insist the Department discriminates against them because they are members of a class of military reservists. We find no case law supporting the assertion that a class of military reservists is either a suspect class entitled to strict scrutiny or even a quasi-suspect class entitled to intermediate scrutiny.

We therefore proceed to examine their claim only to be sure that Directive No. 2212 is rationally related to furthering a legitimate state interest. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam). Two of the Directive's objectives, as we have noted, were the maintenance of adequately staffed correctional facilities and a reduction in abuses of the military leave policy resulting in inordinate overtime. Because the means to accomplish these goals—the changing of correction officers' pass days to coincide with their military duty days—is not a purely arbitrary or irrational means of accomplishing this goal, *see Vance v. Bradley*, 440 U.S. 93, 97 (1979), the Directive is rationally related to a legitimate state interest. As a consequence, plaintiffs are not entitled to attorney's fees under § 1988.

Even were we to conclude that plaintiffs stated a substantial equal protection claim, Congress planned to supplant a § 1983 claim with the enforcement provisions of the Veterans' Act. The Supreme Court in *Smith v. Robinson*, 468 U.S. 992, 1012 (1984), instructs that the proper inquiry is whether:

> Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, . . . § 1983 has stood as an independent safeguard against deprivations of federal constitu-

> tional and statutory rights. . . . Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy.

Id.

A § 1983 cause of action is unavailable "when Congress has foreclosed enforcement of the statute in the statute itself, or when a statutory remedial scheme is so comprehensive that there is an implication that it provides the exclusive remedy foreclosing all other remedies." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754 (2d Cir. 1987); *see also Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981). If a § 1983 cause of action is unavailable, attorney's fees may not be awarded under § 1988. *See* 42 U.S.C. § 1988(b).

The enforcement scheme of the Veterans' Act is particularly detailed and comprehensive. It provides a plaintiff with a private right of action through injunctive relief, compensatory damages in the form of lost wages and/or benefits, and the assistance of the United States attorney. *See* 38 U.S.C. § 4302. Further, no fees or court costs may be assessed against a person seeking benefits under the Act. *See id.* These provisions evidence "a statutory remedial scheme [which] is so comprehensive that there is an implication that it provides the exclusive remedy foreclosing all other remedies." *Mrs. W.*, 832 F.2d at 754. Therefore, attorney's fees could not properly have been awarded in this case even were a viable equal protection claim alleged.

CONCLUSION

Accordingly, the district court's judgment dated March 2, 1993 is affirmed, in part, reversed, in part, and remanded for recalculation of damages consistent with this opinion. The issue raised on plaintiffs' cross-appeal with respect to the district court's limitation of overtime compensation is affirmed.

APPENDIX B—Judgment of the District Court for the Northern District of New York, dated March 2, 1993.

Judgment Appealed From

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Plaintiffs,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, III, as Commissioner of the New York State Department of Correctional Services,

Defendants.

82-CV-979

(Cholakis, J.)

JUDGMENT

Pursuant to Order of this Court dated February 28, 1983, Honorable Roger J. Miner presiding, and in accordance with

Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the plaintiff class was certified to include "all those persons employed or who have been employed since March 30, 1982 as Correction Officers, Sergeants or Lieutenants in the Department of Correctional Services of the State of New York and who are or were since March 30, 1982 also members of the National Guard of the State of New York or members of another reserve component of the Armed Forces of the United States of America". Said class includes those specific individuals listed in "Schedule A", annexed hereto and incorporated herein.

This action having come on for a non-jury trial on December 8, 1986 before the Honorable Con G. Cholakis, United States District Judge, and the issues having been duly tried and a Memorandum Decision and Order with respect to liability, dated February 19, 1987, having been duly rendered, and a Memorandum Decision and Order with respect to damages, dated December 31, 1991, having been duly rendered, and the parties having stipulated to the amount of damages and pre-judgment interest through October 1, 1992 with respect to each individual class member in accordance with the Court's decisions and without waiver of any arguments to be made on appeal as to the correctness of the decisions,

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED, that

1. Plaintiffs' right to certain pass days, which days were part of work packages bid upon by plaintiffs and awarded on the basis of seniority, were protected by a Collective Bargaining Agreement.

2. Implementation of Directive No. 2212 dated March 30, 1982 by the Department of Correctional Services, insofar as it caused its employees to reschedule plaintiffs' pass days to days on which military leave had been requested pursuant to §242(5) of the New York State Military Law, denied plaintiffs an incident or advantage of employment in violation of 38 U.S.C. §2021(b)(3).

3. Individual class member plaintiffs shall recover of defendants the respective sums set forth in "Schedule A", annexed hereto and incorporated herein, derived from the Stipulation of Class Action Damages entered into by and between the parties on February 24, 1993, and filed with the Clerk of the Court, together with interest thereon from October 1, 1992 to date of payment in an amount to be stipulated by and between the parties or, if not so stipulated, as further ordered by this Court.

4. Plaintiffs shall recover of defendants the costs and disbursements of this action, including attorneys' fees.

5. Plaintiffs may apply to this Court within 120 days of the date of this judgment for an order awarding a specific amount of attorneys' fees and this Court shall retain jurisdiction of this case for the purpose of determining the amount of attorneys' fees.

6. Pursuant to Local Rule 25, the following is a list of the names and addresses of the attorneys for all parties entitled to be notified of entry of Judgment herein:

a. Rowley, Forrest, O'Donnell & Hite P.C.
Attorneys for all Plaintiffs
90 State Street
Albany, New York 12207

b. Robert Abrams, Esq.
Attorney General of the State of New York
Attorney for all Defendants
The Capitol
Albany, New York 12224

Approved: s/Con G. Cholakis
CON G. CHOLAKIS,
U.S.D.C.J.

Approved: s/(Illegible)
CLERK, U.S.D.C.

DATED:
3/2/1993
Albany, New York

ENTER:
3/2, 1992
Albany, New York

U.S. District Court
N.D. of N.Y.
Filed:
(illegible)

Judgment Appealed From

19-Feb-93 DISTRIBUTION OF $3,848,962.01 BY EMPLOYEE PAGE 1

NUM	NAME	SOCIAL	$ OWED
1	ABANDA, GABRIEL M.	450217572	$2,681.12
2	ABBOTT, RAYMOND H.	050547892	$1,671.74
3	ABPLANALP, LEE	081300696	$2,080.11
4	ABRAHAM, CURTIS	248709012	$7,241.34
5	ACEVEDO, GILBERT	084426226	$5,012.30
6	ACKERMAN, PAUL R.	055542771	$1,194.30
7	ACOSTA, ANTHONY	114305578	$1,976.10
8	ADAMS, GREGORY	083547334	$3,062.62
9	ADAMS, RAYMOND C.	121522302	$1,639.61
10	ADAMS, RICHARD C.	062328699	$2,161.46
11	ADOLPH, EUGENE J.	084462076	$1,647.56
12	ALI, MARDAR	120521057	$0.00
13	ALLEN, BRADLEY	097448120	$12,444.69
14	ALLEN, RONALD J.	122485510	$842.57
15	ALLEN, RUSSELL W.	050343046	$0.00
16	ALLEN, SANDY	077320292	$1,802.65
17	ALLYN, JUDY F.	064427472	$2,974.26
18	ALMODOVAR, SOTO E.	584305174	$4,660.47
19	ALTMAN, WILLIAM C.	084344568	$3,941.29
20	AMEND, RONALD	121289350	$4,280.96
21	ANDERSON, WILLIAM A.	122588257	$1,325.75
22	ANDRADEZ, RALPH M.	110427702	$750.92
23	ANDREWS, FLOYD A.	107409904	$1,229.13
24	ANNETTS, PAUL W.	108343267	$0.00
25	ASHLINE, RICHARD B.	089588057	$2,977.41
26	AUBIN, RAYMOND C.	056368462	$6,225.46
27	AUFIERO, GEORGE JR.	113546896	$1,073.13
28	AUFIERO, GEORGE SR.	053328942	$864.48
29	AUSTIN, HAROLD	060369377	$15,384.84
30	AYERS, WILLIAM E.	056440804	$4,361.90
31	BABBIE, LOUIS H.	095363166	$14,140.04
32	BACON, ARTHUR	071540335	$2,465.14
33	BADACH, JOHN K.	050468700	$6,201.49
34	BAER, RODNEY	082424572	$1,457.42
35	BAETZOLD, PAUL M.	052400104	$0.00
36	BAEZ, LUIS A.	076402424	$1,324.31
37	BAGG, CLIFFORD D.	115440788	$524.70
38	BAILEY, HAL	243641240	$2,363.33
39	BAILEY, JEFFREY A.	115468087	$6,720.00

40	BAKER, JOHNNY	076560474	$3,123.94
41	BAKER, MAURICE J.	107460055	$4,650.44
42	BAKER, TONY J.	103501693	$5,048.13
43	BALANOVICH, LEON JR.	087509836	$2,446.54
44	BALDWIN, RANDALL G.	122360460	$11,581.76
45	BALLOU, CLARENCE E.	073369662	$12,180.83
46	BANIK, CHARLES S.	083524718	$0.00
47	BANKIT, STEPHEN	117466517	$1,248.45
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49	BARBER, JOEL	086362186	$14,404.64
50	BARBER, MICHAEL E.	132508438	$1,998.64
51	BARND, JOSEPH M.	081520367	$0.00
52	BARON, MICHAEL	116383490	$8,692.28
53	BARRETO, ANTHONY	106368327	$7,651.32
54	BARTHOLOMEW, MICHAE	131500106	$0.00
55	BASTEDO, DANNY L.	101444738	$242.13
56	BATISTA, WILFREDO	076340918	$636.01
57	BAUMANN, PETER A.	068369338	$0.00
58	BEARDR, GLEN H.	006400134	$5,723.71
59	BEECHEN, JOHN M.	000000413	$2,910.50
60	BELL, LINDSEY	113383156	$5,306.22
61	BELL, PETER A	099528960	$8,370.25
62	BENNETT, RICHARD E.	052443745	$0.00
63	BENWARE, RAYMOND W.	117469691	$360.53
64	BERMUDEZ, ROBERT	052302060	$6,125.75
65	BERRYMAN, RONALD S.	087421137	$9,341.87
66	BEZIO, NORMAN	111403646	$2,258.55
67	BICKFORD, JOHN F. JR.	114402425	$11,644.58
68	BICKFORD, JOSEPH B.	079327627	$6,762.01
69	BISHOP, BARBARA J.	100483266	$15,953.73
70	BLACKMORE, JERRY R.	064380798	$7,539.99
71	BLACKWELL, ROBERT	102343479	$1,786.58
72	BUM, ROBERT A.	056329395	$4,273.64
73	BOLAND, PETER F.	090428399	$171.41
74	BOLBER, WILLIAM H.	078567026	$1,544.82
75	BOLT, ROLAND G.	086448720	$11,606.99
76	BOLTJA, JOHN W.	053462653	$346.37
77	BOOKER, GARY D.	123444429	$2,866.42
78	BOOTHE, HERMAN L.	074360839	$985.07
79	BOUNDY, NORMAN E.	071427528	$6,303.43
80	BOWDEN, ROBERT J.	082366103	$2,343.44
81	BOYD, ANDRE L.	112524286	$0.00
82	BOYLE, JOSEPH P.	127503341	$7,430.49
83	BRADLEY, RALPH L. JR.	070446444	$9,878.23
84	BRASH, CARL	0845905347	$6,783.31

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87	BRIGGS, RITO A.	553983093	$0.00
88	BRIGGS, RONALD	113382698	$4,964.05
89	BRIGHT, JOHN M.	094488093	$4,486.59
90	BRISTOW, THOEDORE	056347448	$543.97
91	BROADIE, EUGENE L.	076488316	$1,330.10
92	BROCKLEY, GEORGE H.	073367760	$1,513.97
93	BROCKWAY, LARRY J.	106342322	$558.44
94	BROOKS, WALTER J.	126347831	$1,368.14
95	BROUGH, FREDERICK L.	091467750	$493.55
96	BROWN, DENNIS	172600350	$7,057.02
97	BROWN, JAMES H.	122229171	$0.00
98	BROWN, JAMES L.	245784548	$7,758.23
99	BROWN, JOHN C.	065443861	$737.59
100	BROWN, RICHARD H.	076349344	$0.00
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102	BROWN, ROBERT T.	093500596	$1,887.18
103	BROWN, THOMAS N.	113541472	$9,906.61
104	BRUCE, FREDDIE R.	098408372	$6,517.64
105	BRUNELLE, KEITH O.	118527369	$3,175.28
106	BRUNESE, BERNARD J.	122285090	$4,271.79
107	BUCKINGHAM, JOSEPH J.	089404305	$1,266.88
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109	BUKOWSKI, JAMES F.	105607232	$1,607.85
110	BULLOCK, DUANE C.	124448596	$506.09
111	BUNDY, MYRON R.	099281040	$4,591.30
112	BURCH, TIMOTHY W.	132488080	$8,602.52
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114	BURNS, TIMOTHY	074527010	$0.00
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116	BUSBY, WAYNE A.	065400432	$17,481.89
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118	BUSSE, JOHN T.	423545719	$522.41
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121	BUTLER, MARVIN, A.	083503583	$3,494.58
122	BYRD, FREDERICK	119442123	$2,172.06
123	BYRNE, STEVE E.	092523209	$8,067.79
124	CABRERA, NESTOR A.	109420273	$4,396.74
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126	CALABRESE, FRANK L.	110587266	$1,755.85
127	CALDWELL, WARD	065403471	$7,715.31
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142	CARTER, MICHAEL J.	063320479	$1,069.47
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150	CHERRY, TIM E.	077505467	$994.73
151	CHESLEY, THOMAS J.	062360976	$524.70
152	CHESTER, DAVID L.	420609489	$3,845.19
153	CHRIST, MICHAEL R.	089501050	$801.71
154	CHRISTOPHER, JON W.	110520713	$4,013.14
155	CLARK, DALE R.	369666915	$10,700.02
156	CLARK, DAVID E.	267827962	$3,547.04
157	CLARK, DUANE R.	55408330	$4,551.80
158	CLARK, MATTHEW G.	057367190	$3,161.45
159	CLARK, ROY W. JR.	099286384	$0.00
160	CLAYTON, LIVINGSTON	066361225	$7,130.29
161	CLEMENT, ALAN L.	081501398	$6,842.98
162	CLEMENT, MICHAEL T.	074566296	$5,990.31
163	CLEMONS, MARIE M.	077568972	$844.05
164	CLUTE, JAMES L.	107286419	$11,672.32
165	COFFEY, JOHN D.	111485493	$8,915.68
166	COLLINS, CHARLES E.	060428636	$2,795.16
167	COLLINS, LOUIS	051367239	$2,585.83
168	COLON, ANGEL L.	062325786	$0.00

NUM	NAME	SOCIAL	$ OWED
169	COLIN, ANGEL M.	092281418	$0.00
170	CONKLIN, GORDON	127600640	$3,759.64
171	CONLIN, GLENN	059465678	$2,490.84
172	CONNELL, JOSEPH T.	132427379	$1,897.21
173	CONNELL, PETER B.	129446891	$1,181.49
174	CONNELLY, JOHN	115349130	$0.00
175	COOK, KENNETH	063427641	$1,448.65
176	COOK, STANLEY L.	121364356	$10,352.97
177	CORBETT, YVONNE	134346907	$3,591.90
178	CORTEZ, GEORGE	095264651	$8,899.69
179	CORTRIGHT, JOHN L.	090489563	$3,409.18
180	COTTER, REGINALD A.	068400677	$6,063.40
181	COUSINS, GARY	088428098	$8,021.60
182	COVENTRY, CHARLES P.	096588907	$1,272.34
183	COWARD, WILBERT	242620657	$2,324.65
184	CRAWFORD, MELVIN	124443652	$2,428.62
185	CRAWLEY, ARNOLD	094349695	$0.00
186	CROWLEY, JAMES C.	070380961	$4,497.97
187	CRUZ, VALENTINE	108440165	$999.85
188	CULVER, DAVID, E.	063324310	$6,435.46
189	CUNNINGHAM, JAMES B.	259749231	$0.00
190	CURRY, DANIEL B.	126348490	$8,658.51
191	DADDEZIO, JERRY A.	065420463	$2,675.76
192	DAILEY, JOHN C. SR.	076347823	$2,403.88
193	DALY, JAMES L. SR.	105341362	$1,540.99
194	DAMOUR, GERALD M.	091564263	$11,144.33
195	DARRAH, WILLIAM C.	103501503	$0.00
196	DAUL, RICHARD G.	128347886	$274.24
197	DAVIDOW, LEONARD	054361531	$3,191.47
198	DAVIS, KENNETH	104403739	$8,541.71
199	DAVIS, LEON H.	116565110	$164.42
200	DAVIS, SOPHIE	104323665	$0.00
201	DEAGLE, WILLIAM J.	070407553	$5,726.07
202	DECKER, KENNETH A.	075567931	$3,427.35
203	DECKER, KENNETH, R.	079402551	$0.00
204	DECICCO, JOSEPH W.	94483032	$0.00
205	DEFENDORF, RICHARD R.	121386266	$3,175.78
206	DEGAETANO, PETER	085242973	$562.32
207	DEGROFF, THOMAS A.	112525476	$13,891.83
208	DELANEY, FREDERICK W.	114387766	$3,004.88
209	DELGADO, FRANCISCO JR	111348616	$0.00
210	DELUCA, NICHOLAS J.	103546657	$3,170.28
211	DEMAY, JOHN C.	097340402	$1,799.24

212	DEMBIK, KEITH A.	105486546	$1,783.77
213	DEVECCHI, PIERRE	078243260	$15,142.33
214	DIAMOND, CHRISTOPHER	125581724	$8,916.99
215	DIEBOLD, THOMAS C.	06630198	$9,647.01
216	DIETERLE, WALTER R.	111441058	$6,927.48
217	DIORIO, JOSEPH	106347069	$743.63
218	DOBBERTIN, FRIEDERICK V	097200931	$617.51
219	DOBBINS, GREGORY	088423288	$3,196.25
220	DODGE, DONALD D.	067424950	$3,322.46
221	DOLLERD, STEVEN	087421198	$543.13
222	DONOVAN, MICHAEL J.	105385812	$5,734.06
223	DOUGLAS, THOMAS M.	132420946	$7,579.01
224	DREWS, MARK P.	075525298	$3,531.75
225	DRINKWATER, ALAN J.	096420685	$3,285.87
226	DRUMM, MICHAEL A.	092607942	$6,158.69
227	DUBIGNON, RENEE S.	123428933	$1,126.34
228	DUBRAY, ROGER T.	082422614	$0.00
229	DUNN, MICHAEL J.	110443687	$1,041.44
230	DUNNIGAN, MICHAEL T.	059483160	$10,604.71
231	DUPLANTIS, CLYDE E.	082545528	$359.15
232	DURGAN, WILLIS S.	054460952	$10,747.10
233	DURRICK, MICHAEL T.	099480151	$3,516.35
234	EASON, STEVEN L.	124384088	$2,110.84
235	ECHEANDIA, WALDEMAN	130366268	$0.00
236	EDGECOMBE, WILLIAM	106264091	$1,956.06
237	EDWARDS, BERTIE A.	087467241	$2,865.52
238	EDWARDS, CHARLES	050181036	$880.21
239	EMERSON, MICHAEL R.	117467810	$0.00
240	EMERSON, WILLIAM J.	085406282	$4,136.63
241	EPIFANIO, LOUIS J.	081544257	$7,068.50
242	ESTES, MICHAEL K.	087426717	$797.97
243	EUSTICE, ROBERT J. JR.	130484534	$2,107.29
244	EVANS, JAMES W.	126344429	$2,244.32
245	EVANS, MARION	104400170	$0.00
246	EVANS, WILLIAM	128204651	$0.00
247	EVANS, WILLIAM A.	112562924	$0.00
248	EVELAND, FRANK R.	100348591	$0.00
249	EYLERS, JOHN D.	094301632	$1,503.82
250	EZERD, CARL V.	069423568	$16,429.54
251	EZZO, SAMUEL T. JR.	094382409	$1,449.25
252	FABIAN, LUDRICK E.	086361791	$9,289.90

NUM	NAME	SOCIAL	$ OWED
253	FACTEAU, JAMES E.	097489667	$4,343.17
254	FALCONE, JOSEPH JR.	088427874	$5,800.24
255	FALLON, LAWRENCE J.	250728789	$2,224.61
256	FARLEY, RALPH D.	236744894	$2,268.99
257	FARRELL, DEAN R.	076545856	$0.00
258	FARRELL, FRANK J.	078320203	$6,070.94
259	FARRELL, ROBERT J.	122409989	$3,319.54
260	FIELD, GARY D.	072389773	$6,025.88
261	FENTON, WILLIAM	547606959	$0.00
262	FERINE, MICHAEL	112263162	$1,422.43
263	FERNALD, ROBERT	112384694	$524.70
264	FERNANDEZ, SAUL	81348639	$11,080.02
265	FERRIS, DALE E.	67509454	$0.00
266	FIELDS, LEROY	419849902	$7,436.77
267	FIGUEROA, LUIS R.	582963[illegible]7	$3,633.08
268	FILIPOWICZ, RALPH A.	1265009[illegible]7	$8,396.37
269	FITZPATRICK, DENNIS	265604814	$0.00
270	FLETCHER, WILBUR	105542434	$0.00
271	FLINT, LELAND C.	063320336	$0.00
272	FLORES, DAVID	085442128	$1,587.92
273	FLORIO, RONALD	078267222	$12,011.62
274	FLYNN, DANIEL D.	091547296	$1,574.95
275	FLYNN, GEORGE S.	079606694	$0.00
276	FOURNIA, RICHARD J.	089447227	$10,552.43
277	FOX, PAUL E.	061201734	$857.63
278	FRANCIS, FRANK A.	076443057	$2,849.90
279	FRANCO, CARMINE M.	096405816	$1,402.35
280	FRANCOIS, JEAN J.	084488907	$3,583.64
281	FRAZIER, GREGORY S.	112461437	$8,028.63
282	FRAZIER, RICHARD W.	006528584	$2,927.19
283	FREY, ANDREW R.	074488457	$1,712.73
284	FRIES, GLEN S.	094425185	$0.00
285	FRITZ, WINSTON L. JR.	106325118	$476.15
286	FROMETA, JOSE	064545034	$1,744.65
287	FRONCZAK, DANIEL	051446025	$9,364.95
288	FURNIA, RONALD P.	061383213	$1,162.88
289	GALBREATH, MICHAEL R.	101444243	$1,434.50
290	GALIZIA, DOMINICK A.	115469919	$1,736.38
291	GALLAGHER, DAVID E.	080527953	$1,063.67
292	GARRETT, KENDELL W. II	133387732	$6,545.68
293	GARRITY, EARL J.	123321362	$10,522.03
294	GASCON, ALLEN L.	052266596	$4,100.73
295	GAUCI, STEVEN N.	112460362	$7,335.82
296	GREBO, DAVID B.	075561781	$2,948.67

297	GREBO, JOSEPH M.	132308522	$1,177.25
298	GEER, THOMAS L.	101442193	$0.00
299	GEERTS, ANTON S.	130301456	$0.00
300	GEGLER, FORBIE J.	078368019	$10,551.84
301	GEISEL, ALLEN	055601265	$1,163.93
302	GEORGE, GARY	097507297	$10,097.17
303	GILMORE, JAMES L.	133345454	$2,605.32
304	GIRARD, MICHAEL	070568032	$2,176.51
305	GLASHEEN, DANIEL J. SR.	113302965	$3,681.60
306	GOLD, JAMES	062388148	$5,020.93
307	GOMEZ, GEORGE	104320288	$0.00
308	GONZALEZ, EDDIE	052542359	$0.00
309	GONZALEZ, HUMBERTO	069382786	$6,398.78
310	GOODHINES, EARL J.	113406944	$3,113.75
311	GORDON, JOHN B.	080489028	$2,082.76
312	GORDON, LYLE M.	051606487	$840.13
313	GORDON, LESLIE A.	057247083	$0.00
314	GORDON, WILLIAM, J.	072321366	$0.00
315	GOSSELIN, MICHAEL J.	060369320	$10,588.59
316	GOSSELIN, RUSSELL J.	117447414	$4,660.56
317	GRANT, LEROY	066345914	$12,138.64
318	GRANT, WILLIAM G.	120362420	$11,693.18
319	GRAVES, THOMAS	128284260	$6,758.94
320	GREEN, JOSEPH S.	086488958	$10,785.68
321	GREEN, LESLIE	070401942	$4,866.74
322	GREEN, PAUL JR.	247860121	$984.61
323	GREEN, PAUL JR.	247860121	$984.61
324	GREEN, ROBERT A.	052301515	$12,911.75
325	GREEN, RONALD J.	057367935	$0.00
326	GREENE, ANDRE R.	072380679	$0.00
327	GREENE, GARY F.	086360632	$1,343.52
328	GREENE, RALPH J. JR.	093580978	$4,155.68
329	GREGG, TOMMY L.	248762438	$519.09
330	GREGORY, DONALD J.	059403257	$2,152.38
331	GREGORY, REYNALDO A.	078367460	$6,445.64
332	GREIN, ROBERT A.	094363283	$1,091.71
333	GRIMES, CAROL	116428990	$0.00
334	GROGAN, JOHN R.	115588511	$2,098.33
335	GRUDZIEN, DENNIS P.	164565035	$2,616.09
336	GRUDZIEN, HENRY A.	086325688	$2,013.40

NUM	NAME	SOCIAL	$ OWED
337	GUADAGNO, MICHAEL	076641499	$1,965.08
338	GUARCO, ANTHONY	129362947	$10,624.50
339	GUBLO, EDWARD	050248035	$8,239.42
340	GULDY, THOMAS R.	090367774	$505.07
341	GUSTAVSON, ERIC R	084308988	$1,324.68
342	GUYETTE, JOHN A.	098409131	$6,524.34
343	HAGGENMILLER, JOHN	137482684	$2,664.29
344	HAHNE, ROBERT E.	082340420	$5,227.44
345	HALL, ALBERT S.	112303082	$8,143.65
346	HALL, LARRY F.	105425142	$2,528.89
347	HALL, MARIE E.	058469027	$5,067.63
348	HALSTEAD, DENNIS	061441140	$0.00
349	HANCOCK, JAMES F.	113436517	$650.33
350	HANEY, PAUL	071386068	$0.00
351	HANSEN, CHRISTIAN	123285286	$0.00
352	HANSON, DANIEL J.	485569370	$3,243.27
353	HARKENREADER, TERRY L	111441109	$654.31
354	HARPER, YULONA Y.	100460875	$11,606.30
355	HARRIS, DARRYL C.	105449267	$928.22
356	HARRIS, GREGORY R.	076441861	$2,344.51
357	HARRIS, ROBERT R.	090406506	$9,357.18
358	HARRIS, WILLIAM A.	048241949	$7,722.82
359	HARVEY, MELVIN	074400435	$9,135.57
360	HARVEY, WILLIAM	090369215	$2,471.92
361	HASBROUCK, LAWRENCE	076381893	$11,520.91
362	HATFIELD, ROBERT	052342402	$10,930.05
363	HAUS, ROBERT P.	080441044	$3,015.43
364	HAYNES, BOYD R.	113383307	$2,330.07
365	HAYNES, LLOYD K.	115467194	$1,643.36
366	HENDERSON, GREGORY	111568361	$2,450.56
367	HENRY, DAVID C.	091386582	$2,229.72
368	HENRY, THOMAS B.	424508001	$3,721.06
369	HERNANDEZ, CARLOS H.	103485982	$6,915.04
370	HERNANDEZ, FRANKLIN R	122282269	$0.00
371	HEWITT, EDWIN E.	111403466	$15,388.21
372	HEWITT, RICHARD M.	072389460	$7,522.70
373	HICKS, ERNEST	088403375	$8,023.27
374	HICKS, GERALD H.	131328128	$12,491.71
375	HIGGINS, WILLIAM F.	112486282	$2,409.05
376	HILDENBRAND, LAWRENC	057466617	$5,428.06
377	HILL, JOHNELLA	052362916	$4,655.21
378	HILL, RAYMAN	121406509	$5,491.97
379	HILLIKER, SAM R.	110508914	$4,803.32
380	HINES, KEVIN M.	132580676	$4,662.27

381	HITCHCOCK, JOHN D.	129405709	$9,324.84
382	HOFAKER, RONALD A.	105387618	$6,004.54
383	HOFFMAN, MICHAEL S.	093545512	$2,761.66
384	HOFFMEISTER, MARI L.	132489842	$9,599.64
385	HOGENCAMP, JESSE D.	097405894	$1,345.88
386	HOINSKI, LAWRENCE S.	061460336	$7,086.85
387	HOINSKI, MICHAEL C.	123522501	$4,214.52
388	HOLLAND, JOSE A.	217429349	$3,863.55
389	HOLLENBECK, STEVEN A.	090568475	$2,816.93
390	HOLLISTER, FRANK E.	058380545	$0.00
391	HOLT, JAMES D.	066282976	$900.32
392	HOOD, THOMAS F.	083345750	$2,229.77
393	HOOVER, MICHAEL J.	133502066	$0.00
394	HOPKINS, JOAN K.	114601349	$1,625.44
395	HOWELL, JERRY M.	061507631	$5,073.35
396	HUGHES, JEFFREY A.	130443292	$972.29
397	HUITFELDT,MARVIN	066386651	$691.84
398	HUMES, RODNEY R.	050442522	$5,358.59
399	HUNTER, JOSEPH	239660193	$0.00
400	HUNTER, KENNETH L.	105429790	$335.79
401	HUNTINGTON, SCOTTY D.	056440828	$1,749.53
402	HUNTLEY, JAMES D.	062424060	$2,566.55
403	HURLEY, HAROLD	062349414	$5,770.28
404	HUSSON, CHARLES L.	090367723	$2,823.30
405	HUVANE, SEAN W.	100487416	$2,472.47
406	HYMAN, ODIS	090205427	$0.00
407	IAK, SCOTT R.	101463298	$2,613.35
408	IRITZ, MARTIN	098388688	$5,117.63
409	IRVING, TIMOTHY M.	127345421	$10,165.18
410	JACKSON, ANDREW J.	085444042	$1,112.74
411	JACKSON, EDDIE P.	091367997	$12,298.33
412	JACKSON, WILLIAM H.	423429458	$5,155.03
413	JAMES, DAVID W.	116467974	$2,445.22
414	JANSEN, ROBERT L.	122386990	$1,026.34
415	JANSSON, DONALD R.	075382046	$458.65
416	JELLISON, RICHARD J.	485528576	$13,226.86
417	JENKINS, GORDON C.	087509054	$5,758.85
418	JENKINS, LARRY J.	114428504	$0.00
419	JENKINS, SHIRLEY	084342198	$1,909.93
420	JIGUERE, MICHAEL C.	074504784	$3,647.45

NUM	NAME	SOCIAL	$ OWED
421	JOHNSON, CHARLES E.	088420608	$513.58
422	JOHNSON, DENNIS	549606964	$1,630.07
423	JOHNSON, ERIC S.	093509538	$2,812.30
424	JOHNSON, FRED	080229560	$10,525.99
425	JOHNSON, MARK W.	074567092	$4,697.01
426	JOHNSON, TONY D.	527523826	$1,575.03
427	JOHNSON, VAN R.	259687144	$1,506.40
428	JONES EARL, W.	227345605	$12,202.12
429	JONES, EDDIE	113320334	$13,025.01
430	JONES, JOHN W.	086362214	$9,409.72
431	JONES, RUTH	070446982	$3,037.84
432	JONES, WILLIE	250723763	$2,830.69
433	JORDAN, BRUCE	108380017	$1,370.26
434	JORGENSEN, JAMES F.	119381537	$13,776.77
435	KAUFMAN, MARK J.	101364226	$0.00
436	KAVANAGH, TIMOTHY P.	079424136	$7,211.75
437	KEENAN, COLIN E.	062362422	$0.00
438	KEITH, JAMES P.	100429983	$4,630.39
439	KENNELY, CLARENCE N.	054406581	$2,261.08
440	KENNEY, JOHN F.	115503523	$5,922.57
441	KEYS, DAVID F.	128386132	$17,228.37
442	KIELBASA, ROBERT J.	090404726	$579.79
443	KILKENNY, HANSFORD	094443206	$10,332.87
444	KILMER, EDWARD S.	098405011	$4,320.61
445	KING, BRYAN E.	125587575	$3,564.26
446	KIPPING, DOUGLAS B.	067423072	$10,227.21
447	KIRKLEY, AUGUSTUS R.	111409113	$3,299.65
448	KIROY, DONALD J. SR.	122362494	$4,570.75
449	KLERCKER, NICHOLAS W.	069482229	$0.00
450	KLINE, MICHAEL F.	090404939	$476.74
451	KMYTA, STEVEN J.	095440034	$456.78
452	KNAPP, RAYMOND E.	076429147	$2,547.11
453	KNIGHT, JAMES J.	064389346	$2,590.86
454	KNOWLTON, EUGENE F.	132422707	$1,273.93
455	KOPROWSKI, DAVID J.	102405874	$449.44
456	KOWALEWSKI, JOSEPH	084505017	$8,444.80
457	KRAMER, ROCKY	125569337	$7,242.45
458	KRITICOS, KONSTANTINO	059422724	$13,404.48
459	KROM, RONALD K.	090362044	$2,360.10
460	KROM, RUSSELL S.	071547566	$1,800.91
461	KRYWALSKI, DAVID H.	098426976	$2,760.32
462	KUPPEL, DOUGLAS L.	110365192	$2,165.39
463	KUSISTO, GEORGE N.	093626635	$11,649.94
464	LABARGE, SCOTT	081588476	$3,206.34

465	LAFORCE, JOSEPH H.	099523147	$701.77
466	LAMAY, JOSEPH S.	060186926	$0.00
467	LAMONICA, GEORGE	071461537	$0.00
468	LANDRY, EDWARD M.	094360268	$5,209.01
469	LANE, ALFRED J. SR.	059282093	$10,713.26
470	LANGLEY, CHARLES H.	055329204	$3,885.52
471	LAPIANA, MATTHEW D.	111480643	$6,193.84
472	LARCHE, RICHARD T.	072301473	$0.00
473	LAROSE, THEODORE A.	100509693	$469.73
474	LARSEN, CHARLES F.	208303132	$12,427.52
475	LASARSO, WILLIAM J.	107389534	$5,229.86
476	LASHOMBE, ROGER A.	123244426	$10,043.61
477	LATOUR, WALTER M.	086461103	$2,307.79
478	LAUPER, ROGER C.	105428435	$2,525.50
479	LAUREANO, SAUL	583012873	$2,720.86
480	LAVARNWAY, GARY J.	095363375	$319.28
481	LAVEGLIA, THOMAS M.	071360043	$12,274.02
482	LAZERSON, ROBERT	120481058	$5,376.70
483	LEACH, MICHAEL J.	073564436	$3,208.33
484	LECLAIR, PAUL L.	074504827	$4,192.58
485	LEDDICK, DONALD L.	076441294	$0.00
486	LEE DONALD C.	100242319	$4,580.17
487	LEFTENANT, JEFFERS JR.	073289203	$347.38
488	LENNOX, ROBERT	075301302	$13,348.29
489	LEONE, JOHN R.	068569119	$1,869.26
490	LEONE, LOUIS A.	071606287	$6,535.89
491	LESLIE, JAMES	134325485	$1,090.01
492	LESTER, GEORGE J.	130402744	$10,913.59
493	LEWIS, REGINALD W.	237709913	$1,244.11
494	LIBURD, HENRY A.	104269708	$0.00
495	LIEME, ALFRED E.	070407547	$5,777.43
496	LINDNER, JOSEPH J.	071288433	$493.75
497	LOBDELL, EUGENE R.	132369216	$471.19
498	LONG, CHARLES D.	082304797	$3,178.73
499	LONG, RICHARD S.	085584400	$5,414.80
500	LONG, RUSSELL F.	117404419	$5,736.71
501	LOPEZ, FRANCISCO	065460580	$2,569.35
502	LOPEZ, GILBERTO	126425045	$0.00
503	LOPEZ, MIGDOEL	091485589	$0.00
504	LOPEZ-SANTANA, ENRIQ	074361066	$1,147.82

NUM	NAME	SOCIAL	$ OWED
505	LOW, LINDA I.	005628660	$2,507.15
506	LUCAS, BRAD L.	089445220	$2,226.86
507	LUCAS, THOMAS J.	063366196	$943.40
508	LUCCHESE, BENEDETTO	094547440	$2,889.81
509	LUDLOW, GEORGE	084462213	$6,002.16
510	LUNSFORD, GEORGE M.	104283438	$3,266.60
511	LYNCH, JAMES	100302482	$2,345.50
512	LYONS, WILLIAM A.	051263248	$336.05
513	MACDOUGAL, STEVEN	054366311	$11,114.10
514	MABWOOD, QUINCY	246767665	$8,198.55
515	MAGYAR, JAMES A.	115560276	$602.72
516	MAHONEY, THOMAS	056564362	$7,013.47
517	MAIELLO, JOHN A.	093543005	$5,144.46
518	MAKOSKE, JOHN M.	126407635	$532.62
519	MALAVE, FRANCISCO	104489474	$1,718.10
520	MANNETTA, RALPH	081449061	$493.69
521	MARDINO, NICHOLAS J.	120506283	$1,039.10
522	MARINO, NICOLO A.	050504171	$2,384.37
523	MARSHALL, BARRY	113502127	$1,781.64
524	MARTIN, JOHN R. JR.	072406779	$487.15
525	MARTIN, JOSEPH E.	118428288	$5,727.85
526	MARTIN, SCOTT L.	094564398	$973.21
527	MARTIN, STEVEN F.	100380749	$0.00
528	MARTINEZ, TILSO	098503178	$0.00
529	MASON, DALE P.	056440495	$16,292.02
530	MASSAR, GEORGE J. JR.	069223110	$5,691.31
531	MATHIS, JEFFREY L.	115526565	$4,329.72
532	MATTHEWS, CARL	078362132	$7,532.17
533	MATTHEWS, MICHAEL W.	101444336	$0.00
534	MATUSZEWSKI, ROBERT	060900741	$7,082.95
535	MAURER, KENNETH W.	103420246	$2,571.69
536	MAY, STEPHEN E.	178408340	$5,586.49
537	MAZESKY, ANDY T.	090369319	$7,901.42
538	MAZZOTE, JAMES	122345478	$520.69
539	MCCALL, E. ARCHIE	238760459	$5,056.29
540	MCCARTHY, PATRICK	076403142	$2,366.68
541	MCCARTHY, PAUL	098388995	$10,552.33
542	MCCOTTERY, ROLAND A.	095362876	$6,832.73
543	MCDONNELL, FRANCIS	075327327	$0.00
544	MCILHENNY, JOHN F.	118604116	$488.57
545	MCKENZIE, OWEN	092388840	$3,146.92
546	MCKINNEY, JOSEPH M.	107403100	$10,365.12
547	MCMAHON, JOHN M.	130340555	$3,115.88
548	MCMICHAEL, JOHN	074566559	$171.79
549	MCMICHAEL, MARK W.	060444768	$4,116.77

550	MCNAMARA, WILLIAM R	113302838	$7,545.25
551	MCNAUGHT, JOHN C.	130424558	$0.00
552	MCNEIL, CHARLES M.	248889021	$0.00
553	MEAD, DONALD E.	113384910	$3,715.21
554	MEAD, ERIC	009547777	$2,647.11
555	MEADOWS, GREGORY L.	078483304	$663.22
556	MEERBOTH, STEVEN J.	067566975	$7,583.26
557	MELVILLE, GORDON C.	115349675	$11,989.69
558	MENDOZA, CAMILO R.	568604550	$3,319.70
559	MERRILL, RICKY (DECEAS	122346329	$0.00
560	MERSERVEY, BRUCE L.	083340163	$3,483.06
561	MEYER, CARL	001302259	$4,500.07
562	MIGLIANTI, HENRY E.	097521580	$4,414.41
563	MIJA, THEODORE	155469956	$2,309.19
564	MILLER, BRIAN T.	000600093	$6,672.00
565	MILLER, KEITH C.	101442625	$0.00
566	MILLER, ROLAND J.	059560312	$934.60
567	MILTEER, JOHN	076423992	$7,021.87
568	MINK, DAVID D.	133363092	$5,072.32
569	MIRALDI, DANIEL J.	053440249	$10,962.30
570	MITCHELL, CHARLES F.	086246744	$809.38
571	MOLINA, AMADO M.	584400504	$2,204.43
572	MOLINELLI, RICHARD E.	103466009	$0.00
573	MOLL, MARTIN E.	101568730	$2,486.32
574	MONTALVO, WAYNE P.	085586225	$0.00
575	MONTBRIAND, RUSSELL P	113382711	$8,432.92
576	MOONEY, PIERCE W.	094600238	$11,040.80
577	MOORE, ERIC J.	127504672	$740.33
578	MOORE, WILLIAM J.	124368093	$2,177.46
579	MORGAN, WILLIAM J.	052421749	$0.00
580	MORRIS, VINCENT	128386158	$6,184.91
581	MORSE, DENNIS J.	461705467	$13,071.02
582	MOSCATELLO, JOHN P.	063248650	$0.00
583	MULLADY, ROBERT S.	119149761	$6,741.44
584	MULVERHILL, KELLY	077504870	$5,198.19
585	MUNSON, JASPER C.	059481244	$2,919.94
586	MURTHA, TIMOTHY P.	131366074	$9,307.06
587	MUSSO, JOSEPH T.	067445690	$3,097.69
588	MUSTICO, RICHARD A.	129420164	$10,541.96

NUM	NAME	SOCIAL	$ OWED
589	MYLOTT, WALTER R.	063263357	$0.00
590	NELLIS, JERRY	091386225	$949.42
591	NELSON, ALLISON	127569169	$2,332.61
592	NELSON, JOSEPH M.	086608180	$2,909.53
593	NELSON, TIMMY D.	097489722	$2,876.74
594	NEWMAN, LAWRENCE	132346176	$1,692.93
595	NICHOLS, DON L.	117442730	$9,753.05
596	NIEMIEC, MICHAEL J.	085581589	$709.03
597	NIEVES, ANDRE A.	069507353	$1,365.64
598	NIEVES, EDWARD	053445680	$2,202.86
599	NOLAN, JOHN R.	109409927	$5,987.61
600	NOONAN, DONALD W.	111589655	$0.00
601	NOTO, LOUIS P.	050469232	$8,038.27
602	NUTTALL, CHRISTOPHER	571565127	$2,404.64
603	OCCHINO, ANTHONY L.	120368025	$9,526.95
604	ODACHOWSKI, DAVID S.	068406299	$7,506.51
605	OGORMAN, JAMES A.	079503432	$2,047.57
606	OLIVER, CHARLES W.	133380117	$1,453.87
607	OMARA, ARTHUR T.	078321961	$1,461.41
608	ONEIL, CECIL	119288706	$557.80
609	ONEIL, JAMES F., JR.	086545447	$0.00
610	ONEILL, FRANCIS H.	263682912	$5,544.08
611	OREILLY, ROBERT	087449585	$7,475.68
612	ORME, NELSON E.	063406388	$1,705.28
613	ORSZULAK, RONALD S.	078426977	$1,266.01
614	OSBORN, TIMOTHY L.	094629437	$339.16
615	OSCZEPINSKI, JAMES C.	078523609	$3,425.93
616	OUIMETTE, RONALD D.	106325496	$3,872.52
617	PACHECO, ANTONIO	062384848	$1,734.50
618	PACHECO, STEPHEN	106362311	$2,273.15
619	PADILLA, SAMUEL	112446304	$4,870.49
620	PAGLIALUNGA, RICHARD	098428497	$1,707.29
621	PALMER, DENNIS L.	065347299	$8,841.32
622	PALMER, MARK L.	102561347	$6,405.59
623	PAMPELLONE, VIVIAN	081344205	$9,159.42
624	PANKO, CHARLES	097540455	$2,576.82
625	PARKER, BRUCE	059464830	$6,662.80
626	PARKER, OTIS R.	056484249	$1,359.01
627	PARKER, ROSE M.	075569459	$0.00
628	PARROTTE, TODD V.	133584185	$2,218.70
629	PASTWIK, PAUL E.	060407742	$4,424.96
630	PATNODE, PHILIP G.	132421315	$6,069.34
631	PAUL, JOSEPH A.	083425355	$2,315.56

632	PAWOLSKI, KEVIN, N.	100521027	$6,539.08
633	PAWLOSKI, PAUL L.	097506309	$0.00
634	PEARSALL, ALAN	237708183	$0.00
635	PEER, DANIEL P.	094566231	$1,340.44
636	PELICONE, FRED A.	080404884	$1,880.97
637	PELLERIN, JEFFREY L.	130580022	$708.88
638	PENDERGRASS, JOSEPH	054288228	$9,747.86
639	PENSO, MICHAEL A.	057566804	$3,027.49
640	PEREZ, DAVID	068486489	$985.54
641	PERKINS, DONALD F.	124365408	$4,247.94
642	PERKINS, JAMES J.	109408693	$5,742.29
643	PERRY, TODD M.	126582834	$7,702.74
644	PERRY, WESLEY F.	134439952	$9,347.53
645	PETERS, GEORGE N.	090401919	$6,039.74
646	PETERS, RONALD J.	100303703	$2,580.08
647	PETERSON, CHARLES	416547475	$1,581.72
648	PETITO, NICHOLAS	076341781	$1,914.65
649	PETRELLI, ANGELO G.	069307300	$655.30
650	PETTENGILL, ALAN F.	097342163	$6,424.58
651	PHILBRICK, GUY S.	066281444	$6,683.12
652	PIERRO, FRANK C.	113348109	$3,473.90
653	PIETRO, STEVEN L.	184423698	$4,392.64
654	PIZARRO, HERMINIO	583091962	$2,430.10
655	POLAKOW, EUGENE	134403735	$4,718.67
656	POLAKOW, MICHAEL	105429078	$238.08
657	POLLACK, DAVID P.	076425336	$8,875.77
658	POLLINO, HARRY	165448796	$3,150.74
659	POOLE, WILLIAM A.	131368207	$0.00
660	PORTER, DAVID	132424148	$1,320.08
661	PORTER, JEFFREY M.	100507690	$9,485.02
662	POST, JOHN J.	517505194	$719.62
663	POWERS, DANIEL M.	102547336	$166.34
664	PRENDERGAST, WILLIAM J	099404907	$2,482.35
665	PRICE, HOWARD	124367386	$0.00
666	PRZYBYL, RICHARD W.	080445152	$491.84
667	PUGH, LAMONT M.	092609225	$5,413.99
668	QUINN, DONALD L.	076440132	$0.00
669	QUINONES, WALDO J.	125402236	$3,787.86
670	RAMOS, TINA M.	113500934	$1,853.41
671	RAMSEY, TYRONE	083461597	$1,816.65
672	RANDALL, BRUCE D.	063408354	$0.00

NUM	NAME	SOCIAL	$ OWED
673	RANKIN, RAYMOND A.	131327624	$7,330.90
674	RATHBUN, RAY T.	088308619	$0.00
675	RAY, RONALD S.	111383748	$0.00
676	RAYMOND, JAMES R.	057542614	$2,407.32
677	REDDING, BENJAMIN J.	071540887	$9,719.18
678	REED, WILLIAM J.	052627779	$2,227.83
679	REESE, HOWARD F.	097349563	$495.91
680	REGALLA, JOSEPH	125283282	$8,674.18
681	REGNET, MICHAEL W.	091568759	$4,192.90
682	RENAUD, PIERRE A.	094367574	$0.00
683	RESTO, GEORGE L.	060564076	$835.89
684	REYES, JOSE	056545806	$2,603.44
685	REYNOLDS, MARK J.	088502051	$1,201.89
686	RHINO, RODNEY	122507872	$0.00
687	RHODES, MICHAEL E.	577585440	$4,567.42
688	RHYNDERS, RONALD L.	084305944	$322.50
689	RICCI, JEREMIAH J.	084286779	$4,746.23
690	RICE, EDWARD	124407614	$0.00
691	RICH, JOHN G.	124507621	$0.00
692	RICHARDSON, RICHARD W	315667225	$0.00
693	RICHBOURGH, WILLIE	093369118	$14,419.50
694	RICHMOND, CLIFFORD	133401088	$4,730.29
695	RIDDICK, PATTY	237945995	$1,225.94
696	RIELLY, RICHARD	090505796	$1,620.80
697	RIGBY, DANIEL J.	062380145	$6,888.84
698	RILEY, GREGORY W.	070562060	$855.01
699	RIPLEY, BENAJAH	101441202	$0.00
700	RIVERA, ATILANO	057502574	$1,224.37
701	RIVERA, BENJAMIN	129364577	$10,566.10
702	RIVERA, ERNESTO	101366263	$10,735.16
703	RIVERA, LUIS F.	063427499	$0.00
704	RIVERA, MARCUS A.	132344515	$1,353.49
705	RIVERA, ROBERT	112363797	$0.00
706	ROACH, JOHN E.	095425510	$2,218.50
707	ROBINSON, JOSEPH F.	086360440	$0.00
708	ROBLES, LUIS C.	094388463	$1,727.91
709	RODABAUGH, KING C.	051388172	$2,828.73
710	RODGERS, ALPHONSO	111305604	$8,330.52
711	RODGERS, JOHN E.	081588032	$1,549.09
712	RODRIGUEZ, GEORGE	130324771	$1,783.08
713	RODRIGUEZ, HAROLD	124309068	$2,790.79
714	RODRIGUEZ, RICHARD	062340590	$7,708.04
715	ROHAUER, JAMES D.	055626897	$372.70
716	ROMERO, ISRAEL	090545012	$0.00

717	ROPER, ERNEST	249726100	$1,104.57
718	ROSNER, EDWARD C.	133380177	$662.05
719	ROSS, STEPHEN C.	115428841	$0.00
720	ROWE, CHARLES, C.	254662923	$3,408.61
721	RUMSEY, LEE S.	390327564	$2,514.29
722	RUNYAN, DANIEL B.	131585113	$2,257.80
723	RUPP, MICHAEL	065483009	$2,961.24
724	RUPSIS, CHARLES W.	056349644	$3,839.63
725	RUSSELL, CHARLES A.	134403808	$7,232.84
726	RUSSO, PAUL M.	113586134	$3,281.66
727	RYAN, MICHAEL C.	068583308	$0.00
728	RYBACZYK, FRANK J.	096345286	$3,844.81
729	SADLER, THOMAS	102484959	$5,609.37
730	ST. GERMAIN, RONALD G.	121308512	$0.00
731	SAMUELS, DONNY	115503007	$4,498.59
732	SANBULA, POLICARPO	074363891	$2,067.64
733	SANDELIN, ALFRED D.	332369622	$1,949.64
734	SANTIAGO, JOSE	075549336	$1,639.88
735	SANTIAGO, RAMON	104400837	$0.00
736	SAPIO, SAMMY	084461495	$763.90
737	SARV, JURI	067284823	$14,606.98
738	SAWYER, TIMOTHY	133562696	$1,457.28
739	SCARINGI, ANTHONY C.	110429316	$11,384.01
740	SCHALLER, WILLIAM M.	115505622	$1,059.84
741	SCHMITT, GUSTAVE C.	114286417	$11,649.97
742	SCHOLL, JOHN W.	095401590	$2,902.46
743	SCHOLTISEK, RICHARD A.	115548917	$166.17
744	SCHOTTMAN, EUGENE W.	068405186	$540.48
745	SCHRADE, RICHARD	095407041	$0.00
746	SCHWARTZ, MICHAEL R.	084505478	$5,057.02
747	SCROBE, ANDREW	094463560	$0.00
748	SCROCARELLI, FRANCIS R	061302268	$2,179.11
749	SEARS, BRUCE S.	076327094	$5,139.58
750	SEARS, FRANK L.	055340564	$0.00
751	SELMER, ANTHONY L.	053440362	$3,988.43
752	SEMSKI, ROBERT M.	088264321	$0.00
753	SHARKEY, FRANCIS E.	088280057	$1,155.08
754	SHARP, JOHN	081520707	$5,020.67
755	SHAW, TERRY L.	127505270	$3,238.31
756	SHAW, TODD	098468721	$2,421.61

NUM	NAME	SOCIAL	$ OWED
757	SHIFLETT, JOHN L.	516343171	$11,986.32
758	SHERMAN, GARY J.	061406903	$873.18
759	SILVER, RICHARD S.	104345326	$9,202.48
760	SIMMONS, KARL D.	102406304	$2,653.55
761	SIMMONS, MARK D.	072406088	$1,018.13
762	SIMPSON, SQUIRE	092289889	$0.00
763	SKINNER, PAUL D.	133502831	$355.96
764	SKROCKI, GERALD J.	131466288	$343.55
765	SLACK, RICHARD J.	100546701	$400.62
766	SMEDLEY, FRANK	075380910	$6,470.01
767	SMITH, ALLEN GIBSON	081465479	$2,664.42
768	SMITH, CUFFORD P.	004541743	$454.16
769	SMITH, COLEMAN L.	080520520	$9,943.22
770	SMITH, PATRICK	093428152	$0.00
771	SMITH, RICKY J.	075522592	$2,969.77
772	SMITH, SOPHIA	129565218	$718.29
773	SMYTHE, GEOFFREY B.	104585347	$0.00
774	SNOW, ANDREW A.	103583682	$331.56
775	SONGUI, STEPHEN A.	081462298	$5,389.09
776	SPAULDING, ROBERT H.	074629175	$5,773.74
777	SPEAR, DWIGHT K.	076427791	$12,395.00
778	SPENCER, WILLIAM, JR.	118588221	$2,480.15
779	SPIRAWK, ROBERT S.	111306932	$0.00
780	SPRAGUE, WILLIAM	077601866	$0.00
781	SPREER, DONALD R.	088407022	$4,552.21
782	STARR, ROBERT C.	061482902	$2,514.89
783	STEESE, RICHARD L.	105526822	$2,427.66
784	STEINWANDEL, FREDRICK	120364939	$3,782.61
785	STETSON, DENNIS J.	045425279	$4,382.95
786	STEVENS, ARTHUR H.	103422688	$10,130.79
787	STEWART, MARK W.	074543568	$2,330.94
788	STINSON, JAMES D.	051564409	$6,201.92
789	STODDARD, JEFFREY L.	100542102	$5,200.44
790	STOKES, JAMES R.	125424365	$1,940.22
791	STONE, LEE E.	115427733	$438.56
792	STOUT, CALVIN W.	080584293	$2,359.78
793	STRADER, WAYNE W.	325425076	$6,920.99
794	STRONG, RICHARD W.	109442211	$14,269.62
795	STRYCKER, PAUL E.	126320339	$2,358.95
796	STUBBS, CURTISS	072309067	$1,197.69
797	SULLIVAN, DENNIS F.	095421139	$0.00
798	SURPHLIS, WILBERT	124325644	$0.00
799	SWADER, HOWARD F.	090403324	$17,173.92
800	SWART, DANIEL E.	073560960	$4,181.51

801	SWEZEY, WALLACE	113384070	$0.00
802	SZCZEPANEK, THOMAS	129400578	$3,494.75
803	TADDEO, MICHAEL	102385815	$6,569.62
804	TAGGART, RICKY T.	103546566	$1,253.80
805	TALAVERA, IRVING	084404241	$3,607.16
806	TARDIBONE, FRANK J.	119580492	$5,980.63
807	TAYLOR, BARNEY L.	112500020	$729.03
808	TAYLOR, JAMES J.	114520412	$0.00
809	TAYLOR, MARK A.	097481434	$5,868.11
810	TAYLOR, ROBERT	107484888	$5,874.12
811	TEDORD, THOMAS R.	130403782	$14,374.21
812	TEITTER, RAYMOND E.	087421498	$11,369.71
813	TENNIAN, JAMES S.	112460958	$6,687.46
814	THACKER, DAVID E.	225520406	$2,985.15
815	THEOPHIL, JOHN J., JR.	071463641	$3,809.23
816	THOMPSON, MARTIN E.	105541164	$4,807.15
817	THOMPSON, ROGER A.	056448791	$0.00
818	THORPE, VERNON	095322078	$3,928.85
819	THURBERT, HAROLD A.	078526649	$184.31
820	TILLERY, DENNIS	052366822	$4,067.22
821	TILLMAN, JEFF	123469922	$4,372.54
822	TIRADO, LOUIS	078583881	$2,036.14
823	TISI, DENNIS J.	159449524	$2,016.30
824	TORRES, ANGEL	071506180	$8,425.31
825	TOUCHETTE, JOHN	056442341	$787.06
826	TOWNSEND, DONALD L.	111287561	$2,671.30
827	TRACY, EDWIN D.	079503716	$687.14
828	TRACY, EUGENE F.	069347560	$1,471.60
829	TRACY, JAMIE L.	060600533	$7,567.55
830	TREMBLAY, MICHAEL J.	091361389	$877.24
831	TROMBLEY, ROBERT W.	122347475	$9,372.13
832	TROUPE, BENJAMIN D.	249861378	$5,151.52
833	TRUDEAU, PAUL W.	110608672	$1,735.40
834	TRULLI, ALPHONSE M.	009243104	$3,062.56
835	TUCKER, ROCHELLE M.	129420661	-$508.80
836	TURNBULL, ARTHUR W.	133384892	$4,015.22
837	TURNBULL, BURTON	580122677	$873.91
838	TURNER, HOWARD E.	111403828	$11,574.17
839	TURNER, IRVING C.	104402251	$258.50
840	TURTON, DENNIS M.	072364484	$2,761.16

NUM	NAME	SOCIAL	$ OWED
841	TYLEE, STEVEN P.	062549938	$687.57
842	VALENTINO, MARK J.	061406465	$2,091.46
843	VAN ALSTYNE, DONALD M	114226854	$5,708.50
844	VANGUILDER, PATRICK	094364991	$277.08
845	VANSCOY, PETER J.	115362400	$5,063.98
846	VANSON, STEPHEN N.	063442592	$374.15
847	VANTASSEL, JOHN	112449817	$2,420.36
848	VANTRAN, WILLIAM A.	082320964	$4,330.63
849	VEDDER, TIMOTHY L.	131566094	$1,948.60
850	VEGA, GERONIMO	085402763	$1,924.15
851	VEGA, WILLIAM	121347007	$0.00
852	VELELLA, JOSEPH AL	067600464	$913.54
853	VERDERBER, JOHN J.	130547276	$4,647.54
854	VIGLIANTE, WILLIAM	081362692	$2,111.58
855	VILLANUEVA, EUGENIO	076402173	$0.00
856	VITTHUHN, JOSEPH W.	075429066	$8,686.24
857	VITVITSKY, JACK	076384012	$3,383.52
858	VOLPE, ANTHONY D.	059608500	$347.38
859	VOSBERG, WILLIAM C.	122306458	$13,090.89
860	WAHRENDORFF, RICHARD	131485764	$13,970.18
861	WAITE, NORMAN R.	009200875	$3,343.41
862	WALASKI, STEPHEN M.	192342594	$420.96
863	WALICZEK, WALLACE J.	127343000	$7,851.84
864	WALKER, GARY D.	056304698	$0.00
865	WALKER, GLORIA	418768808	$3,577.02
866	WALKER, GREGORY D.	065347348	$1,822.37
867	WALKER, HOESEY	113284785	$3,671.93
868	WALKER, JEANETTE C.	115526282	$2,799.85
869	WALKER, TYRONE C.	265601469	$4,601.70
870	WALL, JED J.	093508819	$7,561.71
871	WALTER, RICHARD F.	095362588	$5,261.93
872	WARD, HUGH	058440216	$2,100.27
873	WARNER, DARRYL W.	111429754	$5,897.37
874	WARNER, TIMOTHY S.	052547054	$1,193.79
875	WASHINGTON, BRUCE	10238 8	$7,798.24
876	WATFORD, LEONARD	122363631	$3,216.15
877	WEBB, WILLIAM	051361146	$681.61
878	WEBBER, JOSEPH	067525097	$6,972.46
879	WEEKES, OSWALD L.	055446898	$6,608.25
880	WEIS, ROBERT C.	069441305	$2,666.14
881	WEMETTE, DANNY H.	117444124	$1,543.42
882	WERNER, MARTIN D.	116324720	$0.00
883	WEST, WILLIAM J.	125342157	$14,954.74
884	WHALEY, BENJAMIN	248841924	$5,438.14

885	WHALEY, THOMAS E.	108523873	$0.00
886	WHITFORD, RICHARD P.	057365752	$969.17
887	WHITNEY, JAMES E.	055624546	$2,531.38
888	WHITNEY, RICHARD E.	086408188	$15,500.71
889	WIEZIOLOWSKI, JAMES P.	105386501	$1,895.60
890	WILD, HERBERT C.	086321354	$1,868.45
891	WILENKEN, ALAN S.	123368942	$13,099.04
892	WILKIN, EDWARD R.	133369617	$14,147.43
893	WILKINSON, GLEN F.	100406215	$6,479.17
894	WILLIAMS, ARCHIE M.	050384825	$1,886.03
895	WILLIAMS, CARLTON	050441756	$0.00
896	WILLIAMS, CLIFTON	123446594	$566.40
897	WILLIAMS, GORDON P.	106322819	$10,686.75
898	WILLIAMS, LYDIA C.	113422054	$13,234.92
899	WILLIAMS, MARK S.	057627537	$1,768.43
900	WILLIAMS, RICHARD	127369153	$0.00
901	WILLIAMS, RICHARD R.	100520002	$5,369.05
902	WILLIAMS, STEPHEN R.	072367850	$2,760.54
903	WILLIAMS, THOMAS A.	085480513	$3,480.94
904	WILLIAMSON, LEVELL S.	052422287	$1,047.82
905	WILLS, GEORGE	059424193	$1,711.19
906	WILLS, MICHAEL A.	083445840	$0.00
907	WILSON, FLOYD B.	098422744	$1,415.01
908	WILSON, HENRY A.	123305986	$3,988.92
909	WILSON, NATHAN	133285000	$865.19
910	WINFIELD, ROBERT J.	063365026	$7,399.76
911	WOJNAR, MICHAEL J.	057547526	$0.00
912	WOLFORD, WILLIAM F.	233820995	$2,555.55
913	WOODYARD, ROBERT A.	130468831	$1,072.92
914	WOODIN, WAYNE	088406238	$4,677.00
915	WRIGHT, WILLIAM	056208518	$8,445.31
916	WYNKOOP, JAY C.	088543365	$1,065.24
917	YEAPLE, JAMES C.	052361346	$3,486.83
918	YELLE, STEPHEN S.	065481034	$420.96
919	YOUNG, CARL J.	115548603	$0.00
920	YOUNG, DONALD W.	089487937	$2,672.86
921	ZANELLI, PAUL A.	109444405	$2,495.15
922	ZELAYA, LUCAS	050287270	$1,456.29
923	ZIELINSKI, ANTHONY W.	081304588	$828.39
924	ZIMMERMAN, FRANK J.	081465377	$4,658.05

	NUMNAME		SOCIAL	$ OWED
	925	ZUPA, ANTHONY J.	051228461	$1,404.03
	926	ZYWICKI, FRANK J.	105509712	$1,397.09
VAPL	1	Amell, John	121546440	$4,551.98
VAPL	2	Bailey, Kenneth	128302436	$6,137.49
VAPL	3	Bonham, David C.	076426266	$1,868.64
VAPL	4	Bowen, Mary T.	100426930	$14,175.93
VAPL	5	Broder, Howard	127268627	$2,277.71
VAPL	6	Caster, Brian H.	107408830	$5,525.36
VAPL	7	Chambliss, Alvin C.	240725774	$10,052.36
VAPL	8	Charlton, Thomas E.	103500669	$1,238.60
VAPL	9	DiGerlando, Douglas J.	083325911	$6,063.73
VAPL	10	Dobranski, John	088507970	$3,444.89
VAPL	11	Donivan, Gary J.	082304863	$9,721.52
VAPL	12	Edwards, Harry J.	115347617	$7,042.78
VAPL	13	Elson, David H.	085400414	$16,646.17
VAPL	14	Eurich, Raymond H.	102381528	$1,539.41
VAPL	15	Facteau, Michael T.	077600220	$3,841.00
VAPL	16	Gilmel, Thomas F.	111402761	$6,020.54
VAPL	17	Glover, Dennis M.	132569371	$8,019.92
VAPL	18	Haywood, Lesley D.	103424857	$12,339.12
VAPL	19	Jones, James J.	577723759	$1,504.39
VAPL	20	La Barre, Stanley A.	054460986	$8,747.71
VAPL	21	Lauricella, John C.	065560706	$6,234.45
VAPL	22	Leonard, Francis J.	097349930	$1,028.95
VAPL	23	Mahoney, Robert	111283629	$16,758.88
VAPL	24	Manthei, Mark P.	112540766	$1,398.28
VAPL	25	McGee, Robert L.	077320053	$8,713.22
VAPL	26	Morehouse, Gerald O.	055522169	$10,467.49
VAPL	27	Parcell, John C.	054364639	$3,735.63
VAPL	28	Pease, Allen S.	088406386	$11,597.84
VAPL	29	Phillips, Earl W.	127322483	$6,567.77
VAPL	30	Pomerantz, Aaron	054366493	$5,642.90
VAPL	31	Ranieri, Michael	100429870	$1,842.64
VAPL	32	Reed, Guy R.	120405855	$11,641.24
VAPL	33	Sabatura, Walter M.	065482698	$11,056.44
VAPL	34	Sarvis, James W.	062328596	$7,200.25
VAPL	35	Servedio, Donato	092440499	$8,873.79
VAPL	36	Shark, William	248568804	$9,450.91
VAPL	37	Sowers, James M.	099529141	$15,591.27
VAPL	38	Stork, Brian R.	568746040	$549.62
VAPL	39	Tabachnick, Barry S.	107423586	$8,152.80
VAPL	40	Tangorre, Michael J.	063408779	$5,034.35
VAPL	41	Thomas, Edward A.	076405853	$2,653.57
VAPL	42	Washington, Glen	069368783	$9,485.46
VAPL	43	Wescott, Richard J.	111289373	$14,136.99
VAPL	44	West, Julian	094380957	$3,904.24
VAPL	45	Winton, Floyd A.	098444058	$1,124.23
VAPL	46	Zimmer, Michael T.	097389314	$12,348.31
			TOTAL	$3,848,962.01

APPENDIX C—Memorandum Decision and Order of the District Court for the Northern District of New York, dated December 31, 1991.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Plaintiffs,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN III, as Commissioner of the New York State Department of Correctional Services,

Defendants.

82-CV-979
Filed: 12/31/91
Entered: 1/2/92

Appearances:

Rowley, Forrest & O'Donnell, P.C., Attorneys for Plaintiffs, 90 State Street, Albany, New York 12207

Robert Abrams, Attorney General State of New York, Attorney for Defendants, Department of Law, The Capitol, Albany, New York 12224

CON. G. CHOLAKIS, D.J.

Of Counsel:

Thomas J. Forrest, Esq.

Alan S. Kaufman, Esq.
Assistant Attorney General

MEMORANDUM DECISION AND ORDER

Plaintiff class consists of approximately 520 Correction Officers, Sergeants or Lieutenants employed by the Department of Correctional Services of the State of New York ("Corrections") since March 30, 1982, and who are or were also members of the National Guard of the State of New York or another reserve component of the Armed Forces of the United States of America since the same date. As members of the Guard or other reserves, plaintiffs were required to report periodically for training throughout each year. Such reporting requirements often conflicted with already scheduled work days for Corrections.

This lawsuit, commenced in 1982, consisted of a challenge to defendant's Directive No. 2212 pursuant to which defendants rescheduled employees' days off ("pass days")

so that the days plaintiffs had to report for military duty always fell on pass days. This court, by Memorandum Decision and Order dated February 19, 1987, held that (1) the plaintiffs' rights to the pass days, which days were part of work packages bid upon by plaintiffs and awarded on the basis of seniority, were protected by a collective bargaining agreement; (2) the implementation of Directive No. 2212 denied plaintiffs an incident or advantage of their employment because of their military obligations, which thereby violated 38 U.S.C. § 2021(b)(3); and (3) plaintiffs were entitled to be compensated for the value of their pass days, "which value is to be measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave." *Rumsey v. New York State Dept. of Correctional Services,* No. 82-CV-979, slip op. at 14 (N.D.N.Y. Feb. 19, 1987).

The parties were directed to determine, for each plaintiff, (1) the number of pass days reassigned pursuant to Directive No. 2212; and (2) the wages that each plaintiff would have received for the days he or she was on military duty had he or she been granted military leave for the maximum period allowed by N.Y. MIL. LAW § 242. *Id.* By March 11, 1988, the parties reached preliminary agreement concerning the computation of straight time wages and the number of pass days changed for individual members of the class. *See* Forrest Aff. par. 4. A tabulation sheet was developed for each class member, listing the year; facility; number of "compensable RDO's,"[1] which is the number of rescheduled days, under the maximum of thirty days, payment for which is allowed under the New York Military Law; number of "non-compensable RDO's," which is the number of re-

[1]"RDO" is nowhere defined, but the Court assumes that it stands for "Rescheduled Day off" or "Reassigned Day Off."

scheduled days off above the thirty day limit; and the compensable straight time total.[2]

Although plaintiffs' and defendants' counsel agreed upon a tabulation sheet for each class member, 32 class members dispute the calculations. Plaintiffs' counsel requested that each of these class members provide further documentation, if any, to support their claims. Counsel has submitted what is believed to be accurate tabulation sheets for these class members and, because counsel has not obtained final approval by these individuals, requests that the Court give these individuals the opportunity to withdraw from the class if the final individual tabulations made for them are still unsatisfactory to them. *See* Forrest Aff. par. 7; *id.* Ex. B.[3]

The issues presently before the court are as follows:

(1) Whether any and all recovery is barred by the Eleventh Amendment, and if not,

(2) the amount to be paid for the first 30 days under § 242, whether at time-and-a-half or straight time;

(3) the amount to be paid for days in excess of 30;

(4) whether plaintiffs are entitled to be compensated for vacation and personal days that were used, in lieu of pass

[2]Other columns included on the tabulation sheets concern some of the issues this decision must address, to wit: non-compensable straight time total; time and one-half total; and interest awarded.

[3]Although this affidavit was filed with the Court on September 1, 1988, the number of class members disputing the tabulation sheets has apparently remained unchanged. Counsel reiterated, during a conference held in chambers on January 15, 1991, that 32 class members had still not agreed to the figures in the tabulation sheets.

days for military leave, to avoid the effects of Directive No. 2212;

(5) whether plaintiffs are entitled to prejudgment interest;

(6) whether plaintiffs are entitled to attorney's fees; and

(7) the appropriate course of action to take with respect to the 32 class members who disagree with their tabulation sheets.

Eleventh Amendment

Initially, the Court must determine whether, as alleged by the defendants, the Eleventh Amendment bars the recovery of retroactive monetary relief. The Eleventh Amendment renders a state absolutely immune from suit in federal court absent either (1) its clear and unequivocal consent or waiver, or (2) the clearly expressed intention of Congress to abrogate such immunity. As to the latter, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

If it is determined, upon review of the relevant statutory language, that Congress has unmistakably evinced its intention to abrogate the States' immunity, the next inquiry is whether Congress has the constitutional power to do so. Until *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Supreme Court had scrupulously avoided deciding whether Congress' power to abrogate states' immunity was limited to those statutes enacted pursuant to its authority under section 5 of the Fourteenth Amendment. *See, e.g., Welch v. State Department of Highways and Public Transportation,*

483 U.S. 468, 475 (1987) ("We assume, *without deciding or intimating a view of the question*, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment.") (emphasis added); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985) (assuming, without deciding, that Congress can abrogate the States' Eleventh Amendment immunity by enacting the 1793 Nonintercourse Act pursuant to its power under the Commerce Clause).

In *Union Gas*, in a plurality opinion written by Justice Brennan and joined by 3 other justices, including Justice Marshall, the Court upheld Congress' abrogation of the States' Eleventh Amendment immunity through the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § § 9601-9675, and its "SARA" amendments. These statutes and amendments were enacted pursuant to Congress' Commerce Clause power. Justice White, in a separate opinion concurring in part and dissenting in part, "agree[d] with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress had the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." 491 U.S. at 57.

As the law presently stands, then, the Supreme Court has held, however temporarily, that Congress' power to abrogate the States' Eleventh Amendment immunity is not limited solely to those statutes enacted pursuant to its authority under section 5 of the Fourteenth Amendment. It is worth noting that every federal appellate court to have addressed the question has found that Congress may subject the States to suit in federal court when Congress acts pursuant to its plenary powers. *See, e.g., In re McVey Trucking*, 812 F. 2d 311, 316 (7th Cir. 1987), *cert. denied sub nom., Edgar v.*

McVey Trucking Co., 484 U.S. 895 (1987) ("[W]e conclude that because Congress may create a cause of action for money damages enforceable against an unconsenting state in federal court under its Fourteenth Amendment power, it may do so under any of its plenary powers"); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (congressional power over extradition, Art. IV, § 2, cl. 2); *Mills Music, Inc. v. Arizona*, 591 F. 2d 1278, 1285 (9th Cir. 1979) (copyright and patent clause, Art. I, § 8, cl. 8).

More pertinent to the present discussion, the provisions involved in this case, 38 U.S.C. § § 2021-2026, have been upheld against Eleventh Amendment challenges by state-defendants. *See, e.g., Reopell v. Commonwealth of Massachusetts*, 936 F. 2d 12 (1st Cir. 1991), *cert denied*, 60 U.S.L.W. 3418 (December 9, 1991) (Congress' abrogation of state's immunity proper under War Powers Clause, Art. I, § 8, cl. 11-13); *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979) (same); *Jennings v. Illinois Office of Education*, 589 F. 2d 935, 942 (7th Cir. 1979), *cert. denied* 441 U.S. 967 (1967) (same).

Santiago v. New York State Department of Correctional Services, 945 F.2d 25 (2d Cir. 1991) contains the Second Circuit's most recent pronouncement on the issue of Congress' power to abrogate a state's Eleventh Amendment immunity. Plaintiff Santiago sued Corrections under 42 U.S.C. § § 1981, 1983 and 1985 (3), as well as under Section 1 of the Fourteenth Amendment, for emotional damages, litigation costs, and an injunction. In rejecting the plaintiff's claims (1) that ratification of the Fourteenth Amendment somehow worked a repeal of the earlier Eleventh Amendment, and (2) that section 1 of the Amendment satisfied the "clear statement" exception to immunity, the

court considered itself constrained by rulings of the Supreme Court in the area. The Circuit stated:

> [T]he [Supreme] Court has *to this date* only sanctioned actions for damages arising from a state's violation of the Fourteenth Amendment when Congress has acted under § 5 of the Amendment to "enforce" its sections with "appropriate legislation" which allows for such a federal remedy. In the absence of Congressional action under § 5, the Court *has not* recognized Fourteenth Amendment abrogation of the Eleventh Amendment, such as would permit an action for damages against a state in federal court.

Id. at 28 (emphasis added).

Although the Circuit rejected Santiago's claims, that court clearly avoided stating that it *would not* allow actions for damages against a state where a statute is enacted pursuant to Congress' other powers, *e.g.*, its War Powers. *Santiago* can be read simply as the Circuit's statement that abrogation of immunity *under the Fourteenth Amendment* is limited (or has, to date, been limited) to those statutes enacted under section 5 of the Fourteenth Amendment.

Curiously, the opinion omits any mention of *Union Gas*, leaving little doubt that the court did *not* decide that Congress lacks authority, pursuant to its plenary powers, to abrogate the States' Eleventh Amendment immunity. Given that (1) other circuit courts of appeal have upheld the Act here in question, (2) the Second Circuit has not specifically addressed the issue, and (3) the Supreme Court has, albeit tenuously, approved of abrogation by Congress of the States' Eleventh Amendment immunity where Congress ac-

ted under its Commerce Clause power, this Court holds that the suit in the present case is not barred by the Eleventh Amendment.[4]

Having found that the relief requested is not barred by the Eleventh Amendment, it is necessary to compute the damages.

Amount Due on First 30 Military Days Under N.Y. MIL. LAW § 242

Under New York law,

> [e]very public officer or employee shall be paid his salary or other compensation as such public officer or employee for any and all periods of absence while engaged in the performance of ordered military duty, and while going to and returning from such duty, not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year. . . .

N.Y. MIL. LAW § 242. Pursuant to this provision, where a person is required to perform military duty on a scheduled work day, the person is entitled to compensation from the employer for that day as though he or she had worked as scheduled. The employee is so compensated up to a maximum of thirty such days per year.

In addition, plaintiffs cite a provision of the collective bargaining agreement which states that "[t]ime during

[4]Finding that Congress had the authority to abrogate the immunity, it is not necessary to reach plaintiffs' alternative contention that the defendants may have waived their Eleventh Amendment immunity in their papers in response to plaintiffs' motion for a preliminary injunction and their motion papers for an order pursuant to 9 U.S.C. § 3.

which an employee is excused from work because of . . . other leave at full pay shall be considered as time worked for the purpose of computing overtime." Pl. Mem. at 2 (quoting Article 15.1(g) of Collective Bargaining Agreement [Pl. Trial Ex. 6]). Plaintiffs therefore argue that, since (1) military days are compensable and count towards overtime, and (2) the rescheduling by defendants required plaintiffs to work a full five-day week in addition to the otherwise-compensable military days, then the military days should be paid at overtime rates. That is, such weeks of five work days and two military days should result in five days of regular pay and two days of overtime pay. *See* Figure A, appended to this opinion. The practical result is that plaintiffs would be entitled to recover, in this lawsuit, three more days' pay for each of such weeks.

Defendants argue that plaintiffs are not entitled to any compensation for having military drill on a day off. Defendants point to the Court's language describing the value of the pass days as "measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave." *Rumsey v. New York State Dept. of Correctional Services*, No. 82-CV-979, slip op. at 14 (N.D.N.Y. Feb. 19, 1987).

A strict reading of this definition of the "damages" suffered by plaintiffs would result in the award of no damages. Had the pass days not been reassigned, plaintiffs would have worked 3 days, performed military duty for two days, gotten paid for five days, and would have had two days off. What in fact occurred was that plaintiffs worked for five days, performed military duty for two days, got paid for five days, and had no days off. So, according to the Court's definition of damages, plaintiffs would have been paid for five days' work in either case hence there are no damages.

Although defendants claim that the Court seeks to measure damages as the paid military leave plaintiffs were prevented from using, it is this Court's opinion that the measure of damages is, *in addition to the defendants' claim*, the "value" of the *days off* that the plaintiffs did not get to use. Defendants argue that, although they believe *any* payment to plaintiffs would constitute a windfall, there should certainly be no more that straight time pay for the rescheduled pass days that were used for performing military duty.

The Court finds that, for weeks such as those under the heading "Military With Rescheduling" in Figure A, the military days should be compensated at a rate of overtime, reflecting both (1) the pay plaintiffs would have received had the military days occurred on non-pass days (which would have happened absent defendants' rescheduling), and (2) that, since plaintiffs worked five full days and had two military days that, absent rescheduling, would have been compensable, the military days should count towards overtime for those weeks, in accordance with provisions of the collective bargaining agreement. As a practical matter, such calculation serves to compensate plaintiffs for the additional work days and for the loss of pass days for that week.[5]

Amount Due on Military Days After
30 Days Under N.Y. MIL. LAW § 242

As to the pass days rescheduled to coincide with military days when the plaintiffs had already performed military duty for the compensable maximum of thirty days in any year, defendants claim that the plaintiffs actually *benefitted* from the rescheduling policy. In such cases, plaintiffs would

[5]In addition, plaintiffs assert that Article 15.4 of the contract entitles each employee to a $3.50 meal allowance for each pass day that he worked or was required to work. The Court so finds.

otherwise have been able to work only three days for that week, and would have gotten paid for three days. *See* Figure B, appended to this opinion, under heading entitled "Military Without Rescheduling." Plaintiffs "benefitted" because they were given the opportunity to work for five days, receiving pay for those days, when they would otherwise have been able to work only three days.

Defendants do not address the fact that plaintiffs may have *preferred* to have the days off anyway, even if they would only get paid for three days for that week. Once again the issue is really the value of the days off that plaintiffs were not allowed to have due to the rescheduling. Plaintiffs argue that days off are "incidents and advantages" of employment and should be compensable, though at a lower rate than the first 30 rescheduled days compensable under § 242.

Plaintiffs cite the *Boas* settlement in support of the claim that rescheduled days off should be compensated at an overtime rate. Plaintiffs then calculate the purported damages suffered when pass days were rescheduled to coincide with what would have been *non*-compensable military days. The equation offered by plaintiffs consists of pay for pass days rescheduled for compensable military days, that is, time and a half, minus straight time for each non-compensable military day. This results in an award of one-half day's pay per each pass day rescheduled to coincide with what would have been a non-compensable military day.

Not surprisingly, defendants counter that, even were this Court to award damages for the compensable military days, this latter proposal constitutes a windfall. This Court finds unpersuasive, if not incredible, defendants' claim that plaintiffs somehow benefitted from the rescheduling policy when pass days were rescheduled to coincide with non-compensable military days.

The Court also finds, however, that, since plaintiffs were not entitled to payment for military days beyond the thirty compensable under § 242, any amount awarded for rescheduled days beyond the thirty compensable days would be based upon an arbitrary and amorphous conclusion as to the "value" of a pass day, or the value of the day each plaintiff would have "preferred" to be a pass day. The Court therefore holds that any recovery is limited to the first thirty days compensable under the Military Law. The salary plaintiffs would have been paid, had these pass days not been reassigned and plaintiffs had been granted military leave, would have been zero dollars. The court does not find that a non-compensable military day somehow turns into an overtime day because of the rescheduling policy.

Personal Leave and Vacation Leave

Plaintiffs also claim that, following the issuance of Directive No. 2212, some class members, to maintain their scheduled pass days, did not apply for military leave but instead took vacation and personal days on the days they were required to attend military duty. Plaintiffs argue that the issuance of the Directive constituted an anticipatory breach of the collective bargaining agreement, under which plaintiffs had the right, based upon seniority, to bid for a job which included specific pass day schedules. Plaintiffs further claim that the use of leave and vacation days was in mitigation of the damages caused by the Directive, and therefore plaintiffs are entitled to one day's pay for each leave and vacation day used to avoid the rescheduling of regularly scheduled days off.

In their Reply Memorandum, defendants argue that the doctrine of anticipatory breach has no application to this situation. Second, defendants claim that the real issue is one

of causation. The Directive did not announce a policy of changing *all* pass days at all times in the future, but stated instead that, "*when practicable and consistent with the Department's personnel requirements*, regular days off and shift assignments *may* be revised to avoid military drills during scheduled working hours." *Rumsey v. New York State Dept. of Correctional Services*, No. 82-CV-979, slip op. at 2 (quoting Directive No. 2212) (emphasis added). As a practical matter, it may be true that regular days off were *always* rescheduled, but the language of the Directive itself was not mandatory.

Defendants further argue that such "damages," if acceptable in theory, are nevertheless too speculative for actual calculation. Plaintiffs counter by stating that, as reflected in the Exhibits to the Forrest affidavit and reply affidavit, 198 plaintiffs claim that they took their accrued vacation days, sick days or personal days in lieu of applying for military leave. Plaintiffs state that such claims would be easily verifiable by comparing the employee time records and military records of these 198 plaintiffs to determine when a plaintiff took a vacation day, a personal leave day or a work day and also attended military drill. *See* Pl. Reply Brief at 11.

Plaintiffs further state that, should the Court find such days compensable, plaintiffs would still be subject to the restrictions of N.Y. MILITARY LAW § 242 limiting paid military leave days to 30 calendar days. *Id.*

Since it is reasonably clear that the language of the Directive, not being mandatory, is not sufficient to warrant a finding of anticipatory breach, plaintiffs are essentially claiming no more than that they were "anticipatorily" mitigating damages that *may have* occurred had they not used their vacation days. On the other hand, it is clear that, although the Directive did not *require* rescheduling, such rescheduling was done as a matter of course. Plaintiffs

could, therefore, notwithstanding the lack of mandatory language in the Directive, count on rescheduling as a practical matter.

The Court therefore finds that such days, if proven by a comparison of employee time records and military records, be counted toward the satisfaction of the 30 days allowed under N.Y. MILITARY LAW § 242.

Prejudgment Interest

The statute here at issue is silent with respect to the award of prejudgment interest. "Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts." *Waterside Ocean Navigation Co., Inc. v. International Navigation, Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984) (quoting *Lodges 743 and 1746, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 [1976]); *Taliercio v. Compania Empressa Lineas Argentina*, 761 F.2d 126, 129 (2d Cir. 1985). Prejudgment interest has been awarded in cases arising, as does the instant case, under the Veteran Reemployment Rights Act. *See, e.g., Hanna v. American Motors Co.*, 724 F.2d 1300, 1310-1312 (7th Cir. 1984), *cert. denied*, 467 U.S. 1241 (1984); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 430 (5th Cir. 1981); *Accardi v. Pennsylvania Railroad Co.*, 369 F.2d 805 (2d Cir. 1966) (*per curiam*); *Peel v. Florida Dep't of Transp.*, 500 F. Supp. 526, 528 (N.D. Fla. 1980) (and cases cited therein), *aff'd*, 600 F.2d 1070 (5th Cir. 1979).

Generally, a presumption exists in favor of such award, and prejudgment interest should be granted absent equitable

reasons sufficient to overcome the presumption. *Waterside*, 737 F.2d at 154 ("In these days in which all of us feel the effects of inflation, it is almost unnecessary to reiterate that only if such interest is awarded will a person wrongfully deprived of his money be made whole for the loss."). However, "such factors as inordinate delay in prosecution of a suit or wrongdoing by the plaintiff could well give a district court pause before awarding prejudgment interest." *United Aircraft*, 534 F.2d at 447.

In the present case, there is no evidence that plaintiffs were dilatory in the prosecution of the suit, nor of any other wrongdoing by plaintiffs. Defendants argue that prejudgment interest is not needed here to make plaintiffs whole, because plaintiffs did not lose any wages through the implementation of the Directive. Defendants claim that any award of prejudgment interest would amount to a penalty to the defendants and a windfall to the plaintiffs.

This Court is not persuaded by defendants' arguments. Plaintiffs lost the value of the pass days, which value has now been determined in earlier portions of this opinion. Plaintiffs were entitled to the value during the period between the implementation of Directive No. 2212 and the entry of judgment. The provision of prejudgment interest remains merely part of the remedy necessary to make plaintiffs whole again. Plaintiffs' request for prejudgment interest is therefore granted.[6]

[6]In *Reopell v. Commonwealth of Massachusetts*, cited *supra*, the First Circuit explicitly held that prejudgment interest can be considered an element of the relief provided for in § 2022:

> We accordingly conclude that, by its express direction in the VRRA to "compensate" persons for any unlawful loss of wages or benefits caused by state employers, Congress intended to empower courts to award prejudgment interest.

Attorneys' Fees

Plaintiffs seek attorneys' fees pursuant to 42 U.S.C. § 1988. Initially, the Court is reminded that the complaint alleged violations of (1) the Veterans' Reemployment Rights Act ("VRRA"), 38 U.S.C. §§ 2021 through 2026, (2) N.Y. MILITARY LAW § 242, and (3) 42 U.S.C. § 1983. The third claim involved allegations that the Directive violated plaintiffs' rights under equal protection. Plaintiffs also specifically invoked 42 U.S.C. § 1988, seeking attorneys' fees.

In resolving the case in plaintiffs' favor, this Court found that the defendants violated 38 U.S.C. § 2021(b)(3) by denying plaintiffs an incident or advantage of their employment because of their military obligations. *See Rumsey v. New York State Dept. of Correctional Services,* No. 82-CV-979, slip op. at 13 (February 19, 1987). The Court did not reach the § 1983 claim.

The VRRA does not specifically provide that attorneys' fees are to be awarded to the prevailing party. The Act does state, however, that "[n]o fees or court costs shall be taxed against any person who may apply for such benefits." 38 U.S.C. § 2022.

Plaintiffs argue that, under the authority of *Maher v. Gagen,* 448 U.S. 122 (1980), they are entitled to attorneys' fees under § 1988 even though the § 1983 claim was not decide in their favor. The *Maher* plaintiff sued the Commissioner of Income Maintenance for the state of Connecticut, claiming that Connecticut's AFDC regulations violated the Social Security Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiff further alleged that relief was authorized under § 1983. 448 U.S. at 125.

The *Maher* court held that the award of attorneys' fees is not limited to cases in which § 1983 is invoked as a remedy

for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights. Citing the legislative history of § 1988, the Court stated:

> The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
>
> "To the extent a plaintiff joins claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if he prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. [citation omitted]. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine, supra; United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers*

> *v. Gibbs, supra*, at 725." H.R. Rep. No. 94-1558, p. 4, n.7 (1976).

Id. at 132-133 n. 15; *see also Maine v. Thiboutot*, 448 U.S. 1, 4, 9 (1980) (since "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law," "and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit.").

In opposition to plaintiffs' attorneys' fee request, defendants cite *Smith v. Robinson*, 468 U.S. 992 (1984). The *Smith* plaintiffs had alleged that certain state regulations violated the Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1400 *et seq.*, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Rhode Island state law. *See id.* at 998. The district court found for the plaintiffs, and awarded attorneys' fees pursuant to § 1988, finding (1) that plaintiffs had alleged equal protection and § 1983 claims as well as the EHA claim, and (2) that the equal protection claim was colorable and nonfrivolous. *Id.* at 1001-1002.

The First Circuit reversed the grant of attorneys' fees, stating that the EHA did not provide for attorneys' fees, and, because of the comprehensiveness of the EHA, Congress could not have intended its omission of attorney's fees relief to be rectified by recourse to § 1988. *Id.* at 1003.

The Supreme Court, affirming the First Circuit's denial of attorneys' fees, held that § 1988 attorneys' fees are not available where the § 1983 claims are virtually identical to the statutory claims, *and* Congress has intended the statutory scheme to be the exclusive avenue through which a plaintiff may seek relief. *See id.* at 1009. Stating that the Act "establishes an elaborate procedural mechanism to protect

the rights of handicapped children," *id.* at 1010-1011, and that "[t]he crucial consideration is what Congress intended," *id.* at 1012, the Court found that,

> [i]n light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate education.

Id. at 1011.

A review of these cases counsels the following inquiry:[7] First, whether the plaintiff prevailed on the constitutional or the statutory claim. Second, if plaintiff prevailed on the statutory claim, whether that claim, as well as the constitutional claim, arose from a common nucleus of operative facts. Third, whether the constitutional claim was "substantial" or "nonfrivolous" as determined under *Hagans*. Fourth, whether the statutory scheme is sufficiently detailed and pervasive that it would fall under *Smith* such that Congress, having failed to provide for attorneys' fees in the statute itself, could not have intended its omission of an attorneys' fees provision to be rectified by recourse to § 1988.

The first and second issues are the easiest. As stated *supra*, this Court found for plaintiffs on the statutory

[7]This assumes of course, that the statute at issue does not provide for attorneys' fees, as is the case here.

ground, specifically, 38 U.S.C. § 2021(b)(3). All claims here arose from a common nucleus of operative facts, to wit, the effect of the Directive on plaintiffs' work schedules.

The third issue, whether the constitutional claim was "substantial," is hotly contested by the parties. In *Hagans*, the Court, which defined "substantiality" in terms of whether a claim was sufficient for the court to exercise jurisdiction, quoted approvingly a prior decision where the question of substantiality arose in the context of convening a three-judge court under 28 U.S.C. § 2281:

> " 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U.S., at 33; 'wholly insubstantial,' *ibid.*; 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit,' *Exparte Poresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' *Exparte Poresky, supra* [290 U.S. 30], at 32 [(1933)] ....

415 U.S. at 537-538. The *Hagans* court found the constitutional claim there presented to meet the substantiality test in part because "[w]e are unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other." *Id.* at 539.

In the present case, plaintiffs alleged that, notwithstanding the applicability of the "minimum scrutiny" analysis, under which the government need only show that the Directive was rationally related to a legitimate government objective, their rights to equal protection were violated because the targeting of only those corrections guards with military duty for work rescheduling was irrational. Defendants respond that plaintiffs were "targeted" because no other employees had a type of leave similar to the military leave, for which the state would have to compensate even though no work was provided for that day. Defendants distinguish all the other employees who might have taken vacation or personal days, since the state would have in any event had to pay them for those days. The state would not have saved money by targeting such employees, whereas, by rescheduling military leave days to RDO's, the state did not have to pay the plaintiffs a day's pay for no day's work.

Notwithstanding the defendant's purported "rationality" supporting the Directive, reaching the merits of the equal protection claim presupposes its "substantiality."[8] That is,

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[8]The *Hagans* court further stated that the reasoning of the Court of Appeals in that case, finding the equal protection claim there to be non-meritorious,

> may ultimately prove correct, but it is not immediately obvious from the decided cases or so 'very plain' under the Equal Protection Clause. We think the admonition of *Bell v. Hood*, 327 U.S. 678 (1942) should be followed here:

(Footnote continued on next page.)

if the Court can exercise jurisdiction over the case to decide the merits, the case is sufficiently "substantial." Applying the test to plaintiffs' equal protection claim here, even were the Court to ultimately determing that it was not meritorious, it cannot be said that the claim is "insubstantial."

The fourth step in the inquiry is to determine whether the statute at issue fits within the parameters of *Smith*. A reading of 38 U.S.C. § 2022, outlining the enforcement procedures under the VRRA, reveals that it does not create nearly as comprehensive an enforcement scheme as that provided in the EHA. Neither "the provisions of the statute and its legislative history indicate that Congress intended [veterans] with constitutional claims ... to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the [statute]." *Smith*, 468 U.S. at 1009.

Given that the constitutional claims here at issue were not insubstantial, and that the VRRA, not as comprehensive as, for example, the EHA, does not thereby preclude the invo-

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(Footnote continued.)

> "Jurisdiction ... is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Id.*, at 682 (citations omitted.)

415 U.S. at 542.

cation of § 1983 nor therefore § 1988, plaintiffs' request for attorneys' fees under § 1988 is granted.

Class Members Not Agreeing With Calculations

Finally, the Court must determine the proper course to take with respect to those class members who have not communicated to counsel their agreement with the calculation of pass days and compensable straight time. Plaintiffs' counsel recommends, and the Court so orders, that these individuals be given the opportunity to opt out of the class.

s/Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

DATED: Albany, New York
December 31, 1991

FIGURE A[9]

UP TO 30 DAYS UNDER NEW YORK MILITARY LAW

	M	T	W	Th	F	Sat	Sun	Days Paid
Regular Schedule	O	O	X	X	X	X	X	5
Military Without Rescheduling	O	O	X	X	X	M	M	5 (3 + N.Y. Stat.)
Military With Rescheduling	X	X	X	X	X	M	M	Plaintiffs: 5 @ reg. pay +2 OT =8 days' pay Defendants: 5 @ reg. pay

FIGURE B[10]

AFTER 30 DAYS UNDER NEW YORK MILITARY LAW

	M	T	W	Th	F	Sat	Sun	Days Paid
Regular Schedule	O	O	X	X	X	X	X	5
Military Without Rescheduling	O	O	X	X	X	M	M	3
Military With Rescheduling	X	X	X	X	X	M	M	Plaintiffs: 5 @ reg. pay +2 @ ½ pay =6 days' pay Defendants: 5 @ reg. pay

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[9] "X" = work day
"O" = pass day
"M" = military day

[10]
"X" = work day
"O" = pass day
"M" = military day

APPENDIX D—Memorandum Decision and Order of the District Court for the Northern District of New York, dated February 19, 1987.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Plaintiffs,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN III, as Commissioner of the New York State Department of Correctional Services,

Defendants.

82-CV-979
Filed: 2/19/87
Entered: 2/19/87

Appearances:

Rowley, Forrest & O'Donnell, P.C., Attorneys for Plaintiffs, 90 State Street, Albany, New York 12207

Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendants, The Capitol, Albany, New York 12224

Con. G. Cholakis, D.J.

Of Counsel:

Thomas J. Forrest, Esq.

Alan S. Kaufman, Assistant Attorney General

MEMORANDUM-DECISION and ORDER

Plaintiff class consists of approximately 520 Correction Officers, Sergeants or Lieutenants employed by the Department of Correctional Services of the State of New York since March 30, 1982, and who are or were also members of the National Guard of the State of New York or another reserve component of the Armed Forces of the United States of America since the same date.

As part of their military obligations, plaintiffs are required to fulfill certain training schedules throughout the year. In an avowed attempt to avoid reducing its manpower during these training schedules, defendant, Department of Correctional Services, issued Directive No. 2212 on March 30, 1982, (plaintiffs' exhibit No. 13), requiring all correction officers with military obligations to furnish their super-

visors with quarterly military training schedules. The directive further provides:

> [t]he Deployment Lieutenant/Attendance Control Office will review the quarterly training schedules and extra ordered military duty so that, when practicable and consistent with the Department's personnel requirements, *regular days off and shift assignments may be revised to avoid military drills during scheduled working hours* (emphasis added).

Pursuant to this provision, the Department has revised the days off and shift assignments of correction officers to avoid military drills during scheduled working hours. It is this implementation of Directive No. 2212 that is in issue in the current action.

Plaintiffs allege that the directive violates their rights under the collective bargaining contract (plaintiffs' exhibit No. 6), under 38 U.S.C. §§ 2021(b)(3) (1981 & Supp. 1986) and 2024(d) (1981) and under N.Y. Military Law § 242 (1953 & Supp. 1987). Defendants allege they have the right to make the shift and days off changes under paragraphs 15.3 and 24.3 of the collective bargaining contract.

Before addressing each party's contentions, it is necessary to review the practices which have been followed by the parties relative to job, shift and days off assignments. It is conceded by all concerned that management decides what its requirements are in order to properly perform its duties and responsibilities. In furtherance of these obligations, management prepares and posts job descriptions containing the following information:

1) the work shift,
2) the work location, and

3) the work-pass day schedule.

It is clear that these items are presented as a single package which the correction officers bid on in its entirety. They may not bid on each item individually. Therefore, before bidding a particular job package, an employee may consider each component of the package. Which of the components becomes the deciding factor remains up to the individual officer. The job is then assigned to the most senior officer bidding the job who has the ability to perform it (para. 24.3 of the Contract). Once the successful bidder awarded a job package, his rights and privileges are determined by statute and the collective bargaining agreement.

It is item no. 3 above, the work-pass day schedule, which is the focus of the current dispute. While an employee is assigned to work a particular shift at a particular location, the days which he will work and the days that he will have off (pass days) are determined by the so-called 'squad' to which he is assigned. Apparently, several employees can work the same shift at the same work location but, according to the work-pass day squads to which they are assigned, work different days of the week and have different days off. Once an employee is assigned to a particular work-pass day squad, his work days and his pass days are set and can be computed by him for as long as he remains on that job package.

Following a four day non-jury trial of the issues, the court makes the following findings of fact:

1) Security Unit Employees Council 82, American Federation of State, County and Municipal Employees, AFL-CIO, is a duly organized Labor Union representing the plaintiffs.

2) The State of New York and Council 82 signed their first collective bargaining agreement on July 17, 1970 which convered the period beginning April 1, 1970 and ending March 31, 1972 (plaintiffs' exhibit No. 1).

3) The State of New York and Council 82 have entered into additional bargaining agreements covering successive years (plaintiffs' exhibits Nos. 2 - 11).

4) Prior to the parties' first collective bargaining agreement, the assignment of pass days varied. Pass days were assigned and changed by individual watch commanders as required.

5) An employee's pass days were not normally or customarily changed following the signing of plaintiffs' exhibit No. 1 until 1982.

6) Directive No. 2212 (plaintiffs' exhibit No. 13) concerning Military Leave was issued on March 30, 1982.

7) Pursuant to said Directive, plaintiffs were to furnish their watch commanders/supervisors with their Military Training Schedules.

8) Whenever any National Guardsman's/Reservist's military training obligation fell on a regularly scheduled work day, that employee's pass days were re-scheduled to fall on his military training days.

9) Defendants have regularly and consistently followed this practice since the issuance of Directive No. 2212.

10) The rescheduling of pass days has been without the consent of the plaintiffs.

11) Defendants' purpose in rescheduling pass days is two fold;

   a) to provide the increased manpower to fulfill the duties mandated by law,

   b) thereby reducing overtime compendation (plaintiffs' exhibit No. 16).

12) Prior to the issuance of Directive No. 2212, plaintiffs were not required to change their pass days to coincide with their military training days.

13) No other employee's pass days are regularly or consistently changed.

Plaintiffs rely on those portions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 which are now found in 38 U.S.C. §§ 2021 (1981 & Supp. 1986) and 2024 (1981). These sections are intended to protect a returning veteran, whether he was an inductee (§ 2021), or an enlistee (§ 2024), and allow him to regain, within certain limits, the employment he left to serve his country. An employee returning to work after active service with the Armed Forces of the United States "shall not be denied retention in employment or any promotion or other incident or advantage of

employment because of any obligation as a member of a Reserve component of the Armed Forces", 38 U.S.C. § 2024 (b)(3), and he "shall upon request be granted a leave of absence by such person's employer for the period required to perform . . . inactive duty training in the Armed Forces of the United States", 38 U.S.C. § 2024 (d).

While these sections also contain subdivisions intended to protect veterans while serving as members of a Reserve component of the Armed Forces, it is clear that they also apply to National Guardsmen. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 551 n.2 (1981). In *Monroe*, the Supreme Court held that these sections are intended to protect the National Guardsman/Reservist from being discriminated against, but they are not intended to place him in a favored status. He must be treated equally and receive the same benefits as other employees receive but no additional benefits. In the instant case plaintiffs, along with all other correction officers, sergeants and lieutenants, receive their allotted number of days off, but, because of their military leave, they do not necessarily receive them on the same days as other members of their squads.

A review of the employment contracts is necessary in order to determine what value, if any, it places on pass days. The employment contracts in effect when Directive No. 2212 was issued contained the following language:

> Seniority shall be the basis by which employees shall select pass days.

Plaintiffs' exhibit No. 6 (governing the Security Services Unit which is composed of Correction Officers and Sergeants) and plaintiffs' exhibit No. 10 (governing the Security Supervisors Unit which is composed of Correction Lietenants) at paragraph 24.2.

Defendants allege that paragraph 24.2 is superceded, and in effect voided, by paragraph 24.6 of the same contract which reads:

> Nothing contained in paragraph 24.2 of this Article shall prevent mutually agreed to local arrangements regarding the method that pass days are to be selected.

All parties concede that employees do not bid on pass days individually, but that they bid on a job package which contains, in addition to other items, their pass days. It is also undisputed that the job packages are awarded according to seniority. The court finds that pass days, in addition to work shift and work location, are selected on the basis of seniority. While no clear authority has been presented by either side, this Court cannot conclude that paragraph 24.2 is abrogated by the method of bidding which has become the parties' practice.

Paragraph 24.3 of these contracts allows the defendants the right to make any job or shift assignment necessary to maintain the services of the department involved. This paragraph reads:

> [t]he Employer shall have the right to make any *job* or *shift assignment* necessary to maintain the services of the department or agency involved. However, job assignments and shift selection shall be made in accordance with seniority provided the employee has the ability to properly perform the work involved. Before making a permanent assignment the Employer shall post all permanent vacancies in shifts or job assignments for a period of 30 days during which employees may bid. Grievances aris-

> ing under this paragraph shall be processed up to Step 3 of the grievance procedure but not to arbitration (emphasis added).

While the conditions which must exist before these assignments can be made are not set forth, it is clear that such assignments must be made according to seniority. The paragraph does not mention pass days. Had the parties intended, by this paragraph, to give the Employer the right to change pass days, they could easily have included this provision. *See, Neuman v. Pike*, 591 F.2d 191, 194-95 (2d Cir. 1979). Defendants' argument that pass days were intended to be included within the term "shift" is belied by paragraph 24.5 which specifically differentiates between the terms "shift" and "pass day[s]" and thereby recognizes that they are distinct and separate items:

> [t]he shift and pass day provisions of this Article shall not apply to those departments or agencies whose employees function on a rotating shift basis.

It is a well established rule of contract interpretation that "a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect[.]" *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (and cases cited therein).

Defendants further allege they have the right to change plaintiffs' pass days to avoid the payment of overtime, provided they are given the notice provided in paragraph 15.3(a), (b) & (c) of the contract which reads:

> No employee shall have his *shift schedule changed for the purposes of avoiding the payment of overtime*, unless he has been notified of such change one week in advance of the time in which the changed work period is to begin provided, however, that the circumstances necessitating such change are foreseeable prior to such one-week period.
>
> In the event that circumstances necessitating such shift changes are not foreseeable, then such notice shall be given as soon as possible.
>
> In the event such notice of shift change is not given at least 48 hours prior to the starting time of the scheduled shift which the employee is directed to work such employee shall not be deprived of the opportunity to work his normal shift and to be paid overtime for the hours worked in excess of 40 hours in the workweek (emphasis added).

It is therefore clear that the Employer has the right to make any shift schedule changes necessary to maintain the service of any department and may do so even if his purpose is the avoidance of overtime payment, provided the employee is notified within the time periods set forth above. Although there was no clear proof presented as to how the change of plaintiffs' pass days resulted in an avoidance of payment for overtime, the parties agree that overtime is affected, even though the overtime of the particular National Guardsman/Reservist whose pass days are being changed may not be affected. Additionally, Commissioner Coughlin in his August 9, 1982 letter to N.Y.S. Assemblyman Robin L. Schemminger indicated that the changes here

contested, together with other controls, would result in a reduction of overtime costs (plaintiffs' exhibit No. 17).

Paragraphs 15.3(a)(b) & (c) refer only to shift schedule changes and not to pass day changes. The changing of pass days is referred to in paragraph 15.3(e) which reads:

> Regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime.

While this paragraph is clear and unambiguous, defendants allege that it does not apply because days off are not scheduled until they are posted. It is "well established in New York that, where the expressed intention of the parties is clear, a contrary intent will not be created by implication." *Neuman v. Pike*, 591 F.2d 191, 194 (2d Cir. 1979). Therefore, as no authority has been submitted for defendants' position, it is rejected.

Additionally, defendants' position is belied by their own actions. In preparation for the negotiations which resulted in the 1979-82 contract (plaintiffs' exhibit No. 5), defendants submitted their contract demands on or about December 20, 1978 (plaintiffs' exhibit No. 28). These demands proposed to delete paragraph 15.3(e) from the contract entirely. Defendants' demand was not met and the ensuing contract contained the objectionable paragraph.

Later, in preparation for the negotiations which resulted in the 1985-88 contract (plaintiffs' exhibit No. 7), a time subsequent to the issuance of Directive No. 2212, defendants submitted contract demands on or about March 8, 1985 (plaintiffs' exhibit No. 31). In the following terms, defendants submitted a demand that sought to change the offending paragraph:

> regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime *unless done at least one week in advance of the changed date, except in the event of unforeseeable circumstances* (emphasis in original).

The ensuing contract again failed to contain the requested addition.

Given the history of negotiations with respect to this contract, it is clear that defendants were well aware that regularly scheduled pass days could not be changed with impunity, and this court so finds. Additionally, this court finds that the assignment to a work-pass day squad results in regularly scheduled pass days for as long as that employee remains a member of that squad and it is not necessary that the pass days be posted before paragraph 15.3(e) comes into play. The court therefore concludes that plaintiffs' right to the pass days that they bid is protected by paragraphs 15.3(d) and 24.2 of the collective bargaining agreement and that paragraphs 15.3(a) and 24.3 do not give the defendants the right to re-assign plaintiffs' pass days to coincide with their military leave days. The court further concludes that, as a result of defendants' actions, the plaintiffs have been denied an incident or advantage of their employment because of their military obligations in violation of 38 U.S.C. §2021(b)(3).

Having decided that defendants acted improperly, we must now determine what, if any, remedy is available to plaintiffs. Section 2022 of Title 38 provides that the court can "specifically . . . require such employer . . . to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action". There is no allegation or proof that the plaintiffs suffered any direct loss of wages as a result of the reassignment of their

pass days. They did, however, lose their pass days, thereby suffering a loss of benefits. In order to determine the extent of the loss we must look to § 242(5) of New York Military Law which reads:

> [e]very public . . . employee shall be paid his salary or other compensation as such public . . . employee for any and all periods of absence while engaged in the performance of ordered military duty, and while going to and returning from such duty, not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year . . .

The underlined phrase was added by the New York State Legislature and became effective on June 5, 1984.

Thus, it is clear that plaintiffs lost the value of their pass days, which value is to be measured by the salary they would have been paid, had their pass days not been reassigned and they had been granted military leave. The parties are therefore directed to review all personnel records and agree, whenever possible, as to the following items for each plaintiff during each calendar year since March 30, 1982:

1) the number of pass days reassigned pursuant to Directive No. 2212; and

2) the wages that each plaintiff would have received for the days he or she was on military duty had he or she been granted military leave for the maximum period allowed by § 242.

The parties are further directed to compile a list of those plaintiffs about whom there is disagreement, stating the areas of disagreement, and if any, the areas of agreement.

Additionally, the parties are directed to contact the court within 60 days of the date of this order so that a time might be set for completion of this matter.

IT IS SO ORDERED.

Dated: February 19, 1987
Albany, New York

s/Con. G. CHOLAKIS
U.S. District Judge

APPENDIX E—Order of the Second Circuit Court of Appeals denying rehearing, dated May 11, 1994.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11 day of May one thousand nine hundred and ninety-four.

Present: Hon. Richard J. Cardamone
Hon. Joseph M. McLaughlin
Hon. Donald P. Lay*
Circuit Judges,

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES, and THOMAS GRAVES, individually and as representatives of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-v-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants-Cross-Appellees.

Docket Nos. 93-7273(L)
93-7333

A petition for rehearing having been filed herein by Appellants-Cross-Appellees New York States Department of Correctional Services, et al.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,
GEORGE LANGE III, Clerk
By: s/Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

Filed May 11 1994
United States Court of Appeals
Second Circuit
George Lange III, Clerk

APPENDIX F—Judgment of the Second Circuit Court of Appeals, dated March 14, 1994, issued as mandate May 18, 1994.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of March, one thousand nine hundred and ninety-four.

Present: Hon. Richard J. Cardamone,
Hon. Joseph M. McLaughlin,
Hon. Donald P. Lay,*

CIRCUIT JUDGES.

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES, and THOMAS GRAVES, individually and as representatives of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-v-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and THOMAS COUGHLIN, as Commissioner of the New York State Department of Correctional Services,

Defendants-Appellants-Cross-Appellees.

Docket Nos. 93-7273
93-7333

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is affirmed, in part, reversed, in part and remanded to the said district court for further proceedings in accordance with the opinion of this Court. The cross-appeal herein is affirmed.

GEORGE LANGE III, Clerk
By: s/Edward J. Guardaro,
EDWARD J. GUARDARO
Staff Attorney

A TRUE COPY
GEORGE LANGE III, CLERK
By: Carolyn Clark Campbell
Chief Deputy Clerk

ISSUED AS MANDATE 18 May 94

Filed Mar 14 1994
United States Court of Appeals
Second Circuit
George Lange III, Clerk

*Honorable Donald P. Lay, Senior Circuit Court Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.